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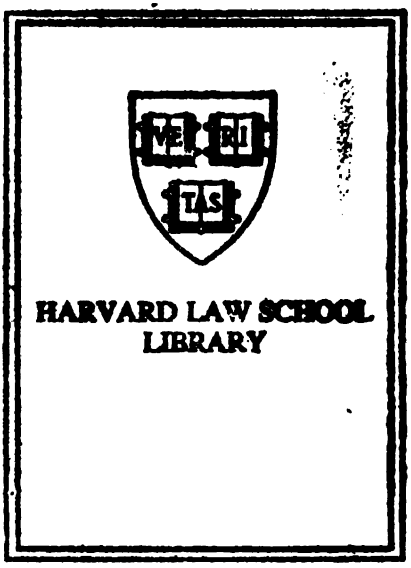

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7m 1
2me 10
13b 349
13b 662

7m 5
13m 384
14m 154
4me157

7m 13
15m 400
15m 402
1me677
2r 383
83 237
84 382

7m 17
9m 610
2me283

7m 21
6b 512
12b 219

7m 38
3me498

7m 39
3b 444

7m 57
11m 192
12m 473
18m 237

7m 80
9m 246
4b 616
4r 138

7m 90
8b 335

7m 92
18m 631
3r 535

7m 96
1r 615

7m 101
3me280

7m 109
12m 317

7m 112
12m 68

7m 116
11m 130
14m 229

7m 126
3me444

7m 133
12m 582
3me357
83 506

7m 162
7m 178
9m 342
13m 118
2me354
4me295
12b 317

7m 171
5r 577

7m 178
8m 220

7m 193
11b 153

7m 202
1du 265

7m 213
11m 46
3me589
84 676

7m 217
9m 396
14m 14
2b 182
6b 560

7m 220
3me248

7m 227
18m 734

7m 232
7m 461

7m 236
8m 513
85 159

7m 258
9m 496

7m 269
13m 267

7m 279
9m 316
9m 317
1r 615

7m 293
13m 386
16m 376
16m 487

7m 299
11m 335

7m 314
11m 310

7m 326
8m 522

7m 351
6b 426

7m 357
1b 95
9b 408

7m 368
12m 39

7m 390
10m 79

7m 401
13m 430

7m 403
8m 101
8m 102
4me234

7m 408
8m 446
14b 445
14b 447

7m 439
1du 50
11b 397

7m 443
6b 159
8b 175
9b 694

7m 447
7b 599

7m 458
18m 517
4b 684

7m 462
2r 231

7m 467
8m 384
11m 218

7m 470
8m 646

7m 481
8m 75
2b 350
2b 377
4b 225
4b 231
5b 154
5b 156
5b 159
5b 409
10b 325

7m 535
12m 42

7m 556
9b 618
10b 661
2r 422
5r 374

7m 565
11m 37

7m 571
7b 418

7m 575
4me306
4b 272
8b 198

7m 579
8m 197
1me628
3me363

7m 583
12m 385

7m 586
2du 258

7m 591
12m 444

7m 608
13m 417

7m 611
8m 620
14m 279
14m 560
15m 316
8b 531
5r 12
86 612

7m 623
12m 633
17m 92
1me217
1me271

7m 633
12m 545

7m 645
12b 347

7m 651
8m 565
9m 44

7m 655
11b 295

7m 661
12m 420
16m 397
17m 129

7m 680
8m 240
16m 807

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REPORTS

OF CASES

AT COMMON LAW AND IN EQUITY,

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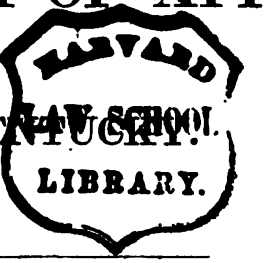

OF KENTUCKY.

BY BEN. MONROE,
REPORTER OF THE DECISIONS OF THE COURT OF APPEALS.

VOL. VII.

CONTAINING THE CASES DECIDED AT THE FALL TERM, 1846, AND SPRING TERM, 1847.

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TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

A

Abel *vs* Wilder &c. 530
Addison & Clendenin *vs* The Kentucky and Louisville Insurance Company, 470
Alexander &c. *vs* Slavens &c. 357
Allen *vs* Sanders, 593
Allison, Hewitt & Co. *ads* De Lazardi, 697
Anderson *vs* Mannon, &c. 217
Same, by Commonwealth *vs* Lightfoot, &c. 298
Anderson's adm'r. *vs* Irvine, 209
Anderson's ex'r. *ads* Taylor and wife, 552
Armstrong *vs* Gibson *et al.* 481
Arnold *vs* Foot & Bowler, 66
Ashlock *vs* Commonwealth, 44
Attorney General *vs* Wallace's devisees, 611

B

Baldridge, &c. *ads* Ring, &c. 535
Banfield *vs* Bruton, 108
Bannister *vs* Weatherford, 271
Bank of Kentucky, &c. *ads* Pilcher *et al.* 548
Baptist Education Society *vs* Craig, 73
Bascom and others *ads* Wickliffe, 681
Basham *vs* Chamberlain, &c. 443
Beard's ex'r. *vs* Basye, 133
Beaty *vs* Cowan's heirs, 152
Ben, &c. *ads* Chisholm's heirs, 408
Best *vs* Higginbothom, 124
Billing *vs* Pilcher and Hauser, 458
Black *et al. vs* Bush *et al.* 210
Blackburn *vs* Davidson, 101
Blanchard and wife *vs* Taylor's heirs, 645
Bland *et al. ads* Smith, 21
Blanks, &c. *ads* Hays, 347
Booker, &c. *vs* Gregory, 439
Bowler, Foot, &c. *ads* Arnold, 66
Brassfield *vs* Walker, &c. 96
Same *ads* Commonwealth, for Russell, 447
Bray *vs* Howard, &c. 467
Breckinridge *ads* Fry, 31
Same *vs* Coleman, 331
Bridges *ads* Lexington and Ohio Railroad Company, 556
Bridgeford *vs* City of Lexington, 47
Bright *vs* Wilson's adm'r. 122
Broadwell *vs* Swigert *et al.* 39
Brown *et al. vs* Gaithers, 90
Brown *ads* Hunter, &c. 283
Same *vs* Foree, &c. 357
Same *vs* Smith, 361
Brown, &c. *vs* Combs, &c. 318
Buck *ads* White, 546
Burke & Tharp *vs* Collin's ex'r. &c. 636
Burnett *vs* Meadow's adm'r. 277
Bruton *ads* Banfield, 108
Bush *et al. ads* Black *et al.* 210

C

Caldwell *ads* Clemens, 171
Calloway's heirs *ads* Hiatt's heirs, 178
Camp *vs* Prather, &c. 599
Campbell *vs* Weakley, 22
Same & Co. *vs* R. B. Todd & Co. 316
Carlisle's heirs *ads* Collins, 13
Carneal *ads* Cowan's heirs, 152
Carrollton, trustees of *ads* Giltner, &c. 680

Digitized by Google

Chalmers *ads* Patterson, &c. 595
Chambers *ads* Pleak, 565
Chamberlain, &c. *ads* Basham, 443
Champlin *vs* Foster and Cunningham, 104
Chisholm's heirs *vs* Ben, &c. 408
Chrisman, &c. *ads* Meres, 422
City of Lexington *ads* Bridgeford 47
Clark *vs* Smith, &c. 273
Same *ads* McDougle, 448
Clark's adm'r. &c. *vs* Rucker, 583
Clay *vs* Scott, &c. 554
Clemens *vs* Caldwell, 171
Clendenin and Addison *vs* The Kentucky and Louisville Insurance Company, 470
Cochran, &c. *ads* Milward, &c. 344
Coke *et al. ads* Howard *et al.* 655
Cole and others *ads* Commonwealth, for Richardson, 250
Coleman *vs* Dallam, &c. 323
Same *ads* Breckinridge, 331
Collett *vs* Jones and Hall, 586
Collins, &c. *vs* Carlisle's heirs, 13
Combs, &c. *ads* Brown, &c. 318
Commonwealth *vs* Young, 1
Same *vs* Trustees of Hopkinsville, 38
Same *ads* Ashlock, 44
Same *ads* Dewey. 78
Same *ads* Louisville and Portland Canal Company, 160
Same *vs* Stout, &c. 247
Same, for Richardson *vs* Cole and others, 250
Same, for Anderson *vs* Lightfoot, &c. 298
Same, for Russell *vs* Brassfield, 447
Corbit *ads* Mattingly's heirs, 376
Cosby's heirs *vs* Wickliffee, 120
Cotton's ex'r. &c. *ads* Tharp & Burke, 636
Cowan's heirs *ads* Owens, &c. 152
Same *ads* Beaty, 152
Same *ads* Carneal, 152
Craig *vs* Trustees Baptist Education Society, 73
Same *vs* Hewitt, 475
Crawford's heirs *vs* Kenley, &c. 253
Same *vs* Logan, 182
Cunningham and Foster *ads* Champlin, 104

D

Dale *et al. ads* Roberts' ex'r. 199
Dallam, &c. *ads* Coleman, 323
Danforth *vs* Talbot's adm'r. &c. 623
Davidson *ads* Blackburn, 101
Davis *ads* Thomas, 227
De Lazardi *vs* Hewitt, Allison & Co. 697
Dewey *vs* Commonwealth, 78
Dooley, &c. *ads* Riggs, &c. 236

E

Embry and Walker *ads* Roberts, 75
Evans *ads* Paynter, &c, 420
Same *ads* Levi, 115
Everett, &c. *ads* Warner, 262

F

Farrow's heirs *ads* Harrow, *et al.* 126
Fauntleroy's heirs *ads* Vanarsdall, 401
Fletcher *ads* Taylor, 80
Floyd *vs* Floyd, &c. 290
Floyd's adm'r. *vs* Floyd, 3
Flournoy *vs* Johnson and Tingley, 693
Foot, Bowler, &c. *ads* Arnold, 66
Foree, &c. *ads* Brown, 357
Foster & Cunningham *ads* Champlin, 104
Fox *vs* Miller, 125
Fry *vs* Breckinridge, 31
Funk *ads* Inman, Galt, &c, 538

G

Gaddie *ads* Whitman, &c. 591
Gaithers *vs* Brown, 90
Galt, Inman, &c. *vs* Funk, 438
Gardner *ads* Vaughn's ex'r. 326
Garrard *ads* Hopkins, &c. 312
Garris' heirs *vs* Garris, 461
Gibson *vs* Moore, &c. 92
Same *et al. vs* Armstrong, 481
Giltner, &c. *vs* Trustees of Carrollton, 680
Goddin *vs* Shipley, 575
Graham, &c. *vs* Moore, &c. 53
Same *ads* Strader, &c. 633
Same *ads* Swigert, &c. 661
Graham's ex'r. *vs* Sam and others, 408
Graves *vs* Graves, 213
Gregory *ads* Booker, &c. 439

Digitized by Google

H

Halbert, &c. *ads* Williams, 184
Hall *ads* Rogers, &c. 349
Same, &c. *ads* Williams, 295
Hall and Jones *ads* Collett, 586
Hardin and wife *vs* Smith's ex'r. 390
Hauser and Pilcher *ads* Billing, 458
Hays *vs* Blanks, &c. 347
Same *ads* Naylor, 478
Same *vs* Younglove, 545
Harrow *et al. vs* Farrow's heirs, 126
Hewitt *ads* Craig, 475
Hewitt, Allison & Co. *ads* De Lazardi, 697
Hiatt's heirs *vs* Calloway's heirs, 178
Higginbothom *ads* Best, 124
Holmes, Sturgeon & Co. *ads* Kincheloe, 5
Hopkins, &c. *vs* Garrard, 312
Howard, &c. *ads* Bray, 467
Howard *et al. vs* Coke *et al.* 655
Hughes *ads* Kemper, 255
Same *ads* Kendall, 368
Hunter, &c. *vs* Brown, 283

J

Inman, Galt, &c. *vs* Funk, 538
Irvine *ads* Anderson's adm'r. 209
Same *vs* Rousseau, 233
James *et al. vs* Langdon, 193
James' adm'r. &c. *ads* Tilford, &c. 336
Jarman *vs* Wilkerson, 293
Jarboe *vs* McAtee's heirs, &c. 279
Johnson and Tingley *ads* Flournoy, 693
Jones *ads* Markham's ex'r. 456
Same and Hall *ads* Collett, 586

K

Kane *et al. vs* Pilcher, &c. 651
Kelly *vs* Lank and Stephens, 220
Kemper *vs* Hughes, 255
Kendall *vs* Same, 368
Kenley, &c. *ads* Crawford's heirs, 253
Kentucky and Louisville Insurance Company *ads* Addison & Clendenin, 470
Kincheloe *vs* Holmes, Sturgeon & Co. 5
Kirkpatrick *vs* Wherritt, assignee, 388
Kuhl *vs* Knaner, &c. 130

L

Lambeth, &c. *ads* Strader, 589
Lampton *vs* Usher's heirs, 57
Langdon *ads* James *et al.* 193
Lank and Stephens *ads* Kelly, 220
Leach *ads* Swearingen, &c. 285
Lee *vs* Lee *et al.* 605
Levi *vs* Evans, 115
Levis, Cook & Co. *vs* Moore, &c. 53
Lewis, &c. *ads* Morgan, 243
Lexington and Ohio Railroad Company *vs* Bridges, 556
Lightfoot, &c. *ads* The Commonwealth, for Anderson, 298
Linney *ads* Richardson, &c. 571
Logan *ads* Crawford's heirs, 182
Louisville and Portland Canal Company *vs* Commonwealth, 160
Louisville & Kentucky Insurance Co. *vs* Addison & Clendenin, 470
Lucas, &c. *ads* Wooldridge, 49

M

Macklin, Rodes, &c. *ads* McCauley, 462
Mahan, &c. *vs* Mahan, 579
Mannan, &c. *ads* Anderson, 217
Markham's ex'r. *vs* Jones, 456
Marr *vs* Smith, 189
Mattingly's heirs *vs* Corbit, 376
Maydwell *ads* Pindell, assignee, 314
Mayhugh *vs* Mayhugh, 424
McAllister *vs* McAllister, 269
McAtee's heirs, &c. *ads* Jarboe, 279
McCauley *vs* Rodes, Macklin, &c. 462
McDougle *vs* Clark, 448
McGuire *et al. vs* The Justices Owsley County, 340
McKinney *ads* Snowden, 258
Meadows' adm'r. *ads* Burnett, 277
Meres *vs* Chrisman, &c. 422
Miller *ads* Fox, 125
Same *ads* Young, 540
Milward, &c. *vs* Cochran, &c. 344
Moberly *ads* Moore, &c. 299
Moore, &c. *ads* Graham, 53
Same *ads* Levis, Cook & Co. 53
Same *ads* Gibson, 92
Same *ads* Parmele, &c. 92
Montague *ads* Petty's heirs, 55

Digitized by Google

Morgan *vs* Lewis, &c. 243
Murphey's heirs and devisees *vs* Murphey, 232

N

Nance, &c. *ads* Shelton, 128
Naylor *vs* Hays, 478
Nelson's exr's. *vs* Nelson, &c. 672

O

O'Bannons *ads* Simrall, 608
Owens, &c. *ads* Cowan's heirs, 152
Owsley County Justices *ads* McGuire *et al.* 340

P

Parmele, &c. *vs* Moore, &c. 92
Parrott's heirs *ads* Richardson, 379
Patterson, &c. *vs* Chalmers, 595
Patton *et al. ads* Pearce's heirs, 162
Paynter, &c. *vs* Evans, 420
Pearce's heirs *vs* Patton *et al.* 162
Petty's heirs *vs* Montague, 55
Phillips *vs* Phillips, &c. 268
Pierce *vs* Pierce, 433
Pilcher, assignee *vs* The Banks, &c. 548
Pilcher, &c. *ads* Kane *et al.* 651
Pilcher and Hauser *ads* Billing, 458
Pindell, assignee *vs* Maydwell, 314
Pleak *vs* Chambers, 565
Poston, &c. *vs* Southern, 289
Prather, &c. *ads* Camp, 599

R

Railroad Company (Lexington and Ohio,) *vs* Bridges, 556
Ramey *vs* Thornberry, 475
Richardson *vs* Parrott,s heirs, 379
Richardson, &c. *vs* Linney, 571
Richardson, by Commonwealth *vs* Cole and others, 250
Riggs, &c. *vs* Dooley, &c. 236
Ring, &c. *vs* Baldridge, &c. 535
Roach's ex'r. *ads* Smith, 17
Roberts *vs* Walker & Embry, 75
Roberts' ex'r. *vs* Dale *et al.* 199
Rodes' adm'r. *ads* Roope, &c. 109
Rodes, Macklin, &c. *ads* McCauley, 462
Rogers, &c. *vs* Hall, 349
Roope, &c. *vs* Rodes' adm'r. 109
Rousseau *ads* Irvine, 233
Rowe *vs* Williams, 202
Rucker *ads* Clark's adm'r., &c. 583
Russell *vs* Wilson, 261
Same, by Commonwealth *vs* Brassfield, 447

S

Sam and others *ads* Graham's ex'r., 403
Sanders *ads* Allen, 593
Scott, &c. *ads* Clay, 554
Scrivenor, &c. *vs* Scrivenor, &c. 374
Shelton *vs* Nance, &c. 128
Shipley *ads* Goddin, 575
Simrall *vs* O'Bannons, 608
Slavens, &c. *ads* Alexander, &c. 351
Smith *ads* Marr, 189
Same *vs* Thompson's heirs, 305
Same *ads* Brown, 361
Same *vs* Roach's ex'r., 17
Same, &c. *vs* Bland, 21
Same *ads* Clark, 273
Smith's ex'r. *ads* Hardin and wife, 390
Same *vs* G. Smith's adm'r., 390
Snowden *vs* McKinney, 258
Southern *ads* Poston, &c. 289
Stephens and Lank *ads* Kelly, 220
Stout, &c. *ads* Commonwealth, 247
Strader *vs* Lambeth, &c. 589
Same, &c. *vs* Graham, 633
Sturgeon, &c. *ads* Kincheloe, 5
Sutton, for Floyd *vs* Floyd, 3
Swearingen, &c. *vs* Leach, 285
Swigert *et al. ads* Broadwell, 39
Same *vs* Graham, 661

T

Talbott's adm'rs., &c. *ads* Danforth, 623
Taylor *vs* Fletcher, 80
Taylor and wife *vs* Anderson's ex'r., 552
Taylor's heirs *ads* Blanchard and wife, 645
Tharp & Burke *vs* Cotton's ex'rs. &c., 636
Thomas *vs* Davis, 227
Thompson *vs* Thompson's ex'rs., 421
Thompson's heirs *ads* Smith, 305
Thornberry *ads* Ramey, 475
Tibbs *vs* Tibbs' ex'r., 112

Digitized by Google

Tilford, &c. *vs* James' adm'r., &c. 336
Tingley & Johnson *ads* Flournoy, 693
Todd, R. B. & Co. *ads* Campbell, &c. 316
Trustees of Baptist Education Society *ads* Craig, 73
Trustees of Carrollton *ads* Giltner, &c. 680
Trustees of Hopkinsville *ads* Commonwealth, 38

U

Usher's heirs *ads* Lampton, 57

V

Vanarsdall *vs* Fauntleroy's heirs, 401
Vaughn's ex'r. *vs* Gardner, 326

W

Walker & Embry *ads* Roberts, 75
Walker, &c. *ads* Brassfield, 96
Wallace's dev's *ads* Att'y. General, 611
Warner *vs* Everett, &c. 262
Weakley *ads* Campbell, 22
Weatherford *ads* Bannister, 271
Wheeler *ads* Winter, 25
Wherritt, ass'ee, &c. *ads* Kirkpatrick, 388
White *vs* Buck, 546
Whitman, &c. *vs* Gaddie, 591
Wickliffe *ads* Cosby's heirs, 120
Same *vs* Bascom and others, 681
Wilder & Co. *ads* Abel, 530
Wilkerson *ads* Jarman, 293
Williams *vs* Halbert, &c. 184
Same *ads* Rowe, 202
Same *vs* Hall, &c. 295
Wilson *ads* Russell, 261
Wilson's adm'r. *ads* Bright, 122
Winter *vs* Wheeler, 25
Woodward *vs* Woodward, &c. 116
Wooldridge *vs* Lucas, &c. 49

Y

Young *ads* Commonwealth, 1
Same *vs* Miller, 540
Younglove *ads* Hays, 545

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JUDGES OF THE COURT OF APPEALS.

The Hon. EPHRAIM M. EWING, *Chief Justice of Kentucky.*

The Hon. THOMAS A. MARSHALL, } *Judges.*
The Hon. DANIEL BRECK, }

☞The cases reported in this volume were selected by the Judges, under an Act of Assembly which directs that they shall permit the publication (under State patronage) of such cases only, as, in their opinion, "establish some new, or settle some doubtful point, or be otherwise by them deemed important to be reported."

JUDGES OF THE GENERAL COURT:

Specially required by statute to attend at every Term and hold the Court.

JOHN L. BRIDGES,

MASON BROWN.

All the other Circuit Judges are, also, members of the Court, but their attendance is not enforced. One Judge will constitute a Court.

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DECISIONS

OF THE

COURT OF APPEALS

OF KENTUCKY.

FALL TERM....1846.

Commonwealth *vs* Young.

INDICTMENT.

ERROR TO THE CHRISTIAN CIRCUIT.

Case 1.

Indictment. Exceptions. Importing slaves.

CHIEF JUSTICE EWING delivered the opinion of the Court.

September 12.

THIS is an indictment against Young for importing, to this State, six slaves, contrary to the provisions of the Statute of 1833, (2 *Stat. Laws*, 1482.) The defendant appeared and demurred to the indictment, which was sustained, and the Commonwealth has appealed to this Court.

Case stated and decision of the Circuit Court.

We would be at a loss to find upon what ground the demurrer was sustained, but for the suggestions of the counsel of Young. The indictment seems to us substantially good, in form and in substance. It commences "The Commonwealth of Kentucky, Christian county, Set." and recites that the jurors, &c., "in the name and by the *authority of the said Commonwealth*, present that Henry Young, late, &c., did then and there *import* into the *county aforesaid*, and into this State, to-wit, into the *county and circuit aforesaid, in the Commonwealth, six slaves*," setting forth their names, and then proceeds to negative the idea that he was an emigrant to this State, or occupied the condition of any of those persons who,

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COMMONWEALTH vs YOUNG.

by the proviso and preceding clauses of the statute, were exempt from the penalties denounced in the first clause, and concludes, "so the jurors upon their oaths aforesaid, do say that the said Henry Young, on the day and year aforesaid, at the circuit aforesaid, did then and there import the said slaves into this State, and *into the county of Christian*, to-wit, *into the county aforesaid*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Commonwealth."

The objection made to the indictment here is, that in setting forth the exceptions or exemptions from the operation of the statute, embraced in the proviso and subsequent clauses, *this State* is used without stating the *State aforesaid* or the *State of Kentucky*, as that he said Henry Young not being an emigrant to *this State*, &c. And that in stating the exception in favor of persons deriving title by will, descent, &c., the word "*distribution*" is omitted. And that the indictment concludes against the peace and dignity of *the Commonwealth*, without stating the Commonwealth *of Kentucky*.

In an indictment for importing slaves contrary to the provisions of the statute of 1833, it is not necessary to state in the indictment, that the defendant does not come within the exceptions or to negative the provisos contained in the statute. These are matters of defence which come more appropriately from the defendant, and need not be anticipated in the indictment.

So much of the indictment as charges the gist of the offence, is set forth with certainty and precision, so that the accused cannot doubt or be mistaken as to the character or nature of the offence, with which he is charged, nor could he, by reason of any uncertainty in the specification of the offence, be exposed to a second prosecution for the same offence. The recitals which are objected to for uncertainty, are recitals in that portion of the indictment which attempts to negative the exceptions contained in the proviso and subsequent clauses of the statute. It was not necessary to state in the indictment, that the defendant did not come within the exceptions, or to negative the provisos contained in the statute. For all these are matters of defence, which more appropriately come from the accused, and need not be anticipated in the prosecution: (1 *Chitty's Criminal Law*, 233, *side page*, 284.) But if it were necessary to state and negative the exceptions contained in the provisos, it seems to us that the statement has been made with sufficient certainty and precision, especially in a matter collateral to the

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gist of the offence. The word *distribution* is not omitted as supposed by the counsel.

We also think that the conclusion against the peace and dignity of *the* Commonwealth, without adding *aforesaid*, or the Commonwealth of Kentucky, is sufficient. All that the constitution requires, is that the prosecution shall be carried on in the name and by the authority of the Commonwealth of Kentucky, and to conclude against her peace and dignity. The indictment commences with the Commonwealth of Kentucky, proceeds in the caption in the name and by the authority of the Commonwealth of Kentucky, and concludes against the peace and dignity of the Commonwealth. After these repetitions of the Commonwealth of Kentucky, in the prior proceedings, the use of the definite article *the* before the word Commonwealth, if scanned with technical and even gramatical strictness, indicates and points with certainty to the Commonwealth intended. To require more certainty, would be to embarrass prosecutions in the web of technical and unmeaning forms, no way essential to the ends of justice or the security of the accused, in a fair and impartial trial upon the merits.

An indictment commencing with the name of *the Commonwealth of Ky.* and professing to proceed *by the authority of the Commonwealth of Ky.*' and concluding *against the peace and dignity of the Commonwealth*, without adding *of Ky. or aforesaid, is good.*

The judgment of the Circuit Court is reversed, and cause remanded, that the demurrer may be overruled and further proceedings had.

Cates, Attorney General, for Commonwealth; *B. & A. Monroe* for defendant.

Sutton, for the use of Floyd *vs* Floyd. Floyd's administrator *vs* Same.

DERR.

ERROR TO THE GARRARD CIRCUIT.

Case 2.

Payment. Commissioners' books. Evidence.

JUDGE MARSHALL delivered the opinion of the Court.

September 12.

WHATEVER doubt may be raised upon the question of fact whether John Floyd intended the payment of these notes as advances to his son Christopher, we think there is enough to authorize a finding that the payments were

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SUTTON, &c. vs FLOYD.

made with that intention. And this being so, the case of *Brown* vs *Brown's administrator*. (4 *B. Monroe*, 535,) decides that the payments themselves consummated the gift without any delivery of the notes to the donee.

There is no error in the Court in refusing to give instructions which are abstractly correct, unless the evidence conduces to the proof of the state of case supposed.

As it is clear that there was no effort to prove or rely on any other payment than that made by John Floyd, and that the whole contest of fact and law turned upon the question whether the payments undisputedly made by him, were intended as advancements to Christopher, and whether if so intended, they operated to discharge him from his obligation to pay the notes, we are of opinion that there was no error prejudiclal to the plaintiff in refusing those instructions which were directly applicable to the issue made by the first plea, which alledged payment by Christopher Floyd, even if those instructions be abstractly correct. The cases were clearly placed before the jury, upon the single question whether the payments by John Floyd were intended as advancements or gifts to the defendant, Christopher. And upon this question the jury were properly allowed to consider all the circumstances of the case, including lapse of time which, although as not being quite twenty years, it did not, of itself, authorize a presumption of payment by the obligor, was yet important, with other circumstances, in its bearing upon the question of the intention with which his father had paid the amount to the holder. The instructions given were correct, and there is nothing to authorize the opinion that the jury was misled by the refusal to give those asked for by the plaintiff.

The Commissioners' book, witho proof that the tax list was given in upon oath, is admissible evidence against the owner of the property listed. And if the Commissioner be absent from the State they are admissible upon proof that the books are in the hand writing of the Commissioner.

On the question of evidence made on the trial, we are of opinion that the tax list of John Floyd found in the books of the Commissioner, and made out in his hand writing, were admissible, the Commissioner being absent from the State, without direct proof that it was given in or sworn to by John Floyd, or that he was ever actually apprised of its contents. The presumption is that both he and the officer performed the duties enjoined upon them respectively by law, and therefore, that the list was the act of John Floyd. As such it furnished (with other testimony in the cause,) ground for the inference that he

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did not ragard these notes as a part of his estate or property, and was, therefore, material in the case.

Wherefore, the judgment in each case is affirmed.

Turner for plaintiff; *Robertson & McKee* for defendants.

Kincheloe *vs* Holmes, Sturgeon & Co.

COVENANT.

ERROR TO THE MUHLENBURG CIRCUIT.

7m 5
a102 172
a102 173
Case 3.
7bm 5
103 515

Guaranty. Notice. Diligence by suit.

September 14.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

THIS action of covenant was brought by Holmes, Sturgeon & Co., merchants of Philadelphia, upon a letter of guaranty, addressed by Wm. Kincheloe to Thomas C. Rockhill & Co., of Philadelphia.

The bill of guaranty.

The letter, bearing date Sept. 13th, 1841, introduces John O'Brian, of the firm of Kincheloe & O'Brian, as visiting Philadelphia for the purpose of purchasing goods, and proceeds as follows: "They are entirely solvent, and doing good business. I will guarantee any debts of theirs. Any friendship you may show Mr. O'Brian, in selling him goods, or introducing him to merchants in your city, will be thankfully received by him, and I will be responsible for any contracts growing out of such introduction. I expect to be in your city next spring." The writer then expresses his regret that his son William, (the same who was a member of the firm of Kincheloe & O'Brian,) had failed in some contract with T. C. Rockhill & Co., and says: "I will give good cash notes, due Christmas next, with a discount of five per cent., for what he owes you, and for all he owes in Philadelphia. No man will ever lose by any of my sons whilst I am able to sustain them. I know their intentions are pure, &c."

The pleadings.

The defendant filed a demurrer to the declaration, and at the same time, five pleas, the third and fifth of these denying that O'Brian was introduced to the plaintiffs by T. C. Rockhill & Co., were adjudged bad on demurrer; and

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KINCHELOE vs HOLMES, &c.

upon the other three, denying that the plaintiffs sold the goods, &c. on the faith of the guaranty, or that they relied on it, &c.; and also denying that the debt had been demanded of the defendant, issues were formed and found for the plaintiffs.

The demurrers to the declaration, and the two pleas, (third and fifth,) present all the questions which need be considered by this Court.

The construction of the letter of guaranty.

The letter of the defendant was obviously intended as a guaranty, not only to Rockhill & Co., to whom it was addressed, but to any other merchants of Philadelphia, who on the faith of it should sell goods to O'Brian at that time, and for the firm of Kincheloe & O'Brian. Nor was it necessary, in order to entitle them to the benefit of the guaranty, that O'Brian should be actually introduced to them by Rockhill & Co. It was sufficient, if upon his reference, the letter was shown to them, or a copy furnished by Rockhill & Co., or by their authority. The pleas third and and fifth, denying an introduction by Rockhill & Co., were therefore properly adjudged bad.

To authorize a recovery upon a general letter of guaranty, it is necessary that the plaintiff not only aver that the guaranty was accepted, the credit given upon the faith of the guaranty, but that the guarantor was notified in a reasonable time, of the credit given, its extent, and terms, and that the guarantor would be looked to for performance thereof.

But the question might have been made on the demurrer to these pleas, and it arises directly on the demurrer to the declaration, whether upon the facts therein stated, the plaintiffs have shown themselves entitled to sue upon the guaranty. This question has been argued with reference to two objections made to the declaration. The first is, that it no where avers that the defendant was notified of the acceptance of his guaranty by the plaintiffs, or of their having acted on it by selling goods on the faith of it, or of the amount of goods sold, and the credit given. The second is, that there is no sufficient averment of due diligence in demanding or coercing payment from the primary debtors, or of notice of their failure to pay. It is contended on the part of the plaintiffs, that this is an absolute and unconditional guaranty; that the mere fact of the plaintiff's having sold the goods on the faith of it, is an acceptance, and binds the guarantor without further act or notice on their part; that they were not bound to any particular diligence against the primary debtor, but only to a reasonable effort to make the debt; that this is shown by their ineffectual suit, brought against

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the purchasers of the goods; and that the averment, that before the present suit was brought, the defendant had due notice of the failure of the principal debtors to pay, and the debt was demanded of him, is sufficient.

By the nature of this action, and the terms of the declaration, the guaranty of the defendant, though contained in a letter to Rockhill & Co., and not addressed particularly to the plaintiffs, is treated as a contract with them. When did the guaranty, which was originally a mere offer made to the merchants of Philadelphia generally, or at least to such as should be applied to for credit by O'Brian on the faith of its promise, become a contract between the plaintiffs and the defendant? Must not that mutual assent of the parties which is necessary to constitute an agreement or contract between them, be evidenced by some external act, or at least by some fact tending to show the assent? Must not this fact be of such a nature as to convey to each a knowledge of the assent of the other? And is the mere fact of selling goods in a distant city to a person having a letter of guaranty, which may or may not have been shown or relied on, a fact of this nature? Or rather may it be asked, is the fact that the party has given to another a general letter of guaranty which may be acted on, sufficient evidence to him that it has been acted on by any particular person? It is true, the assent of the guarantor is sufficiently evidenced by his letter offering to guaranty any debt which the bearer may contract, &c., and he cannot retract his offer after it has been properly acted on. If he says he will guaranty the payment of a particular subsisting debt, and his letter is addressed to the creditor, and retained by him, the bare omission to reject the offer might be sufficient evidence of its acceptance. But in the case of an offer to guaranty future transactions wholly undefined in extent, with persons not named and not known, and which may or may not take place, it seems to be required by the essential nature of a contract, that the guarantor should be informed of the fact that his guaranty has been accepted and acted on, and by whom, and that this information should be communicated to him at once, or at least that the party accepting the guaranty and intending to rely on

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KINCHELOE vs HOLMES, &c.

it, should at once take the proper steps for communicating it. As it should not remain optional with him for any indefinite period, whether or not there is a contract between him and the guarantor. So, not only should the question of his acceptance of the guaranty and assent to the contract, be at once decided in his own mind, but his decision should be at once unequivocally manifested to the party whom he intends to hold bound, and for whose benefit alone an instantaneous decision is required.

But it is in a practical point of view, immaterial whether we say that no contract arises, unless the party intending to rely on the guaranty gives notice of that intention, or that the guarantor cannot be held responsible unless he has had due notice of the acceptance of his guaranty. It is immaterial whether the notice be essential as a prerequisite to the existence of the contract, or whether it is essential to its availability and enforcement. The object or end of the requisition in either case, is that the guarantor may know that he is bound, and to whom, in order that he may be enabled to take such measures for his own safety, as circumstances may require. It cannot be presumed that the maker of a general guaranty, referring to future and indefinite transactions, intends either to dispense with a timely knowledge of the existence and extent of such liabilities as he is willing to incur under the guaranty, or to impose upon himself the burthen of enquiry to ascertain what merchants in a large city may have acted upon it. From the nature of the thing to be notified, which is the act or intention of one of the parties, the duty of giving notice seems appropriately to devolve on him. As in other cases, the notice should be given at once; that is, in reasonable time, with a view to the accomplishment of the purpose for which it is required, and if given after the transaction based upon the guaranty has actually occurred, the notice should communicate the nature and extent of the transaction. All this seems to be required by that good faith and precision and promptness which characterize the principles and usages of the law merchant. And so far at least as regards the necessity of seasonable

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notice of the acceptance of the guaranty, the rule above stated is, as we think, fully sustained by authority.

In the case of *Adams* vs *Jones*, (12 *Peters' S. C. Rep.* 213,) Judge Story, after stating the question to be, "whether upon a letter of guaranty, addressed to a particular person or persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor, that the person giving the credit has accepted or acted on the guaranty, and given the credit on the faith of it," goes on to say, "we are all of opinion that it is necessary, and that this is not now an open question in this Court, after the decisions which have been made, in *Russell* vs *Clark*, (7 *Cranch*, 69;) *Edmondson* vs *Drake*, (5 *Peters*, 624;) *Douglas* vs *Reynolds*, (7 *Peters*, 113;) *Lee* vs *Dick*, (10 *Peters*, 482;) and again recognised at the present term, in the case of *Douglas* vs *Reynolds*." And after demonstrating the entire reasonableness of the rule, he says, "If therefore, the question were entirely new, we should not be disposed to hold a different doctrine, and we think the English decisions are in entire conformity with our own."

Upon referring to the cases above cited, it will be found that while the letter of guaranty is in none of them more indefinite or comprehensive than in this case, it is in several instances decidedly less so. And yet in each of them the same doctrine of the necessity of giving notice of the acceptance of the guaranty, &c., is infalibly maintained. In *Douglas* vs *Reynolds*, (7 *Peters*, 125,) it is decided that the notice must be given in a reasonable time after acceptance of the guaranty, and in other cases the expression is due notice. But without any such express qualification of the rule, the requisition of notice implies that it shall be given in a reasonable time after the fact, so as to make it available to the party for the purposes for which it is required to be given.

In *Chitty on Contracts*, *p.* 500, *Note* 1, reference is made to many American cases, in which the doctrine laid down by the Supreme Court of the U. States, with respect to notice of the acceptance of a guaranty of a future and uncertain transaction is maintained. And we

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Kincheloe to Holmes, &c.

have seen no opposing authority which brings the doctrine into serious question. There is nothing in the terms of guaranty in this case, to take it out of the letter or principle of the rule. It relates to future and indefinite transactions with uncertain and unknown persons. Whether any such transactions would be made, and whether if made, it would be on the faith of the proposed guaranty, and to what extent, and by whom made, are matters of which the guarantor must, in the nature of things, be in the first instance entirely ignorant. The principle of the rule requires that he shall have notice, in order that he may protect his own interest. The expression in the letter, declaring that no one shall lose by any of the writer's sons while he is able to sustain them, is no part of the guaranty, and does not change its nature and extent. It is rather an expression of sentiment than of obligation. It is not as the declaration denominates it, a covenant. And if it were it would be limited by the reference to the ability of the covenantor, with regard to which there is no averment.

The guarantor is entitled to notice of the extent of liability which he was supposed to have incurred by the guaranty in a reasonable time after the credit given, to render him responsible.

The declaration then, is in our opinion, fatally defective, in not averring notice that the guaranty was accepted, and credit given on the faith of it. The only notice averred is, of the total failure of Kincheloe & O'Brian to pay the debt. But as the declaration states the suit against Kincheloe & O'Brian, and the effort to make the judgment by executions, on which only a part was realised, and no other property was found, this averment is understood to refer to the failure of the remedy against the principals. And even if it be understood as implying a notice then given of the acceptance of the guaranty, the notice would have been too late. Nor indeed would it have been timely or seasonable, or due notice, if given only when the credit of six months allowed to Kincheloe & O'Brien had expired. As plainly implied in the opinion delivered by Judge Story, (12 *Peters*, 213,) the notice should have been such as would have enabled him "to avail himself of the appropriate means in law or equity to compel the other parties to discharge him from future responsibility." And although the same strictness may not be required as in giving no-

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tice of a protest, still the notice must be reasonable with reference to the time of the acceptance and the extent of credit, and the purposes of the notice. We know of no rule but that it shall be given in convenient time after the acceptance, or at least after the transaction under the guaranty.

Upon the second objection we need only remark, that without due notice of the acceptance of the guaranty, no diligence in coercing the debt from the principal debtors, or in giving notice of their failure to pay could make the guarantor liable. But as due notice of the acceptance of the guaranty would have sufficed to put the guarantor on his guard, we are not prepared to decide that in case of such a guaranty as the present, the creditors after giving such notice, would be bound to use greater diligence in demanding or coercing payment from the principals, than a man of ordinary prudence would use in his own case, or that they were bound to give to the guarantor any particular notice of their proceedings in this respect, until they called upon him for payment.

Without due notice of the acceptance of a guaranty, notice of diligence in pursuing the principal by suit giving notice of his failure to pay will not render the guarantor responsible. —But after due notice of the acceptance, &c. of the guaranty, any particular notice of the proceedings against the principal, *may* not be necessary until payment be demanded, and a greater degree of diligence would not be required in pursuing the principal than a man of ordinary prudence would take in his own case.

If the plaintiffs had taken a bill of exchange, drawn by Kincheloe & O'Brian, for the price of the goods, they would probably have been bound to use that degree of diligence in its presentation which is prescribed by the mercantile law. But having taken a common promisory note, the same rule does not apply. And we cannot say that there has been any want of diligence against the principal debtors by which the guarantor if ever bound, has been discharged. If it appeared that any thing was lost by the failure to sue from March until September, 1842, the case might possibly be different. But no question arises as to that. But for the defect in the declaration above noticed, the demurrer should have been sustained.

Wherefore, the judgment is reversed and the cause remanded, with directions to sustain the demurrer to the declaration, and for further proceedings.

Pirtle for plaintiff; *Morehead & Reed* for defendants.

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Sci. Fa.

Case 4.

Applegate *vs* Commonwealth.

Error to the Jefferson Circuit.

Criminal case. Sci. fa.

September 14. Judge Breck delivered the opinion of the Court.

Case stated. This was a *scire facias* upon a recognizance entered into by West, with Applegate as his surety, in the Jefferson Circuit Court, in the sum of three hundred dollars, conditioned that West should keep the peace and be of good behavior for twelve months.

The *scire facias* avers that West had violated the condition of the recognizance by committing an assault and battery upon one Alexander S. Fowler, within the period therein named. The defendants filed a demurrer and plea of not guilty. The demurrer was overruled and a verdict and judgment rendered for the Commonwealth for three hundred dollars, and the defendants have brought the case to this Court.

The first, and indeed only question presented by the record, which we deem necessary to notice, arises upon the defendant's demurrer.

A *Sci. fa.* on a recognizance to keep the peace must conclude, "against the peace and dignity of the Commonwealth of Kentucky," and the omission is fatal on demurrer.

The statute, (1 *Stat. Law*, 199,) requires all process upon recognizances in all criminal cases, to conclude "against the peace and dignity of the Commonwealth of Kentucky," and this Court has held the omission of that clause in a *scire facias* upon such recognizance, fatal on demurrer: *Downing* vs *Commonwealth*, (4 *Monroe*, 512;) *Commonwealth* vs *Kimberlain*, (6 *Monroe*, 44.)

As the *scire facias* in the case before us does not conclude as required by the statute, nor any where contain the clause "against the peace and dignity of the Commonwealth of Kentucky," it would follow that it was defective and insufficient, provided the expression in the statute "*in all criminal cases*" should be construed to embrace a case of this kind.

—It is a *criminal* proceeding as contra distin-

The term "criminal," when used in reference to judicial proceedings, is opposed to "civil," and in its most comprehensive meaning, may be regarded as including

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all cases for the violation of the penal laws. In one of the cases referred to, the recognizance was taken in a case of felony. The offence charged in the indictment in the other case, does not appear. The *Commonwealth* vs *Porter*, (1 *Marshall*, 44,) was a prosecution for bastardy, which this Coort recognized as a criminal and not a civil case, and as embraced by the provisions of the statute in question, requiring recognizances in *all criminal cases* to be taken in the name of the Commonwealth of Kentucky.

guished from civil, within the meaning of the constitution of Kntucky.

This is very clearly not a civil case, but, in our opinion, should be considered as embraced by the expression "in all criminal cases," as used in the statute; and consequently the Court below erred in overruling the defendant's demurrer.

Wherefore, the judgment is reversed and the cause remanded, with directions to sustain the demurrer and quash the *scire facias*.

Greene for plaintiff; *Cates*, *Attorney General*, for Commonwealth.

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93 199

Collins, &c. *vs* Carlisle's Heirs, &c.

CHANCERY.

ERROR TO THE GRANT CIRCUIT.

Administrators. Sureties. Contribution.

Case 5.

September 14.

JUDGE BRECK delivered the opinion of the Court.

Case stated.

IN 1836 the last will of A. H. Carlisle was duly proven and admitted to record in the Harrison Circuit Court, and administration, with the will annexed, no executors being named in it, was granted to his widow, Nancy Carlisle and John Mitchell, who, together with R. A. Collins and Levi Ashbrook as sureties, executed a joint administration bond. Subsequently the said Nancy departed this life, and administration upon her estate was granted to James W. Collins, the husband of one of the daughters of the testator.

This bill was filed by said James W. Collins and wife, and the other children of the testator, who being infants,

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COLLINS, &c. vs CARLISLE'S HEIRS.

sue by the said James as their guardian and next friend, against said Mitchell as the surviving administrator and the sureties in the administration bond.

The bill, besides the foregoing facts, alledges that the defendant, Mitchell, took upon himself mainly the administration of the estate of the testator; that no settlement was made by him and said Nancy before her death, nor since by him, of the administration. A settlement is sought and appropriate relief against Mitchell and the securities.

Decree of the Circuit Court.

The Court below was of opinion that the funds of the estate received by Mitchell, after deducting credits, together with the interest, amounted to $3,675 68, and that he and the sureties were responsible therefor to the complainants, and decreed accordingly. To reverse that decree the defendants prosecute this writ of error.

Husband devises his estate after the payment of debts "wholly to his wife, and to be disposed of by her and divided among my children at her discretion." Held that the wife took an estate for life, with full power to give to the children, or appropriate it to their use at her discretion; and she dying, the children of the testator take that undisposed of by their mother under the will.

The first question for consideration arises upon the construction of the following clause in the will of Carlisle:

"As to my property and wealth, I first wish all my just debts and funeral expenses punctually paid, and the balance of my estate, wholly, I leave to my beloved wife, Nancy Carlisle, and to be disposed of by her and divided among my children at her discretion."

The Circuit Judge was of opinion that under this provision the widow was entitled to a life estate and to the extent that the estate had come to her hands and had been appropriated by her to the use of herself and children, that Mitchell and the sureties were not responsible.

In that opinion we concur. The testator manifestly intended his children to have the benefit of his estate, but as they appear to have been all infants and all females, he vested a discretionary power in the mother as to the time and mode of appropriating it for their benefit. So far as she acted under the authority thus given her by the will, her acts were final and conclusive. But as she died without controlling or disposing of the estate in the hands of Mitchell, the complainants, at her death, became entitled to it, not as contended, as her heirs, but under the will of their father.

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Administrators who give a joint bond, are liable jointly for the acts of each other upon the bond, their sureties are liable for each.

If then the complainants, as legatees of their father, were entitled to the estate in the hands of Mitchell, the question arises as to the liability of the defendants, Collins and Ashbrook, as sureties in the administration bond. The condition of the bond is, that the estate is to be paid over to whoever may be entitled to it. But it is insisted that assets in the hands of one administrator or executor, are assets in the hands of both, and that each is responsible for the acts of the other. This position is undoubtedly true, where a joint bond has been executed as in this case, but the liability arises alone upon the bond; for at common law, one executor was not responsible for the acts of a co-executor in relation to property, over which he had exercised no control: *South's heirs* vs *Hoy's executors*, (3 *Monroe*, 95;) *Moore et al.* vs *Waller's heirs*, (1 *Marshall*, 488.) But upon the bond each becomes responsible for the acts of the other, but the responsibility is as surety. The bond effects no change in the office or fiduciary character of the parties or in their relations to each other, except that each, in virtue thereof, occupies the attitude of surety for the other. Collins and Ashbrook were sureties for each administrator, and each a co-surety with them for the other. It results from this view of the case, that the widow, as co-surety with Collins and Ashbrook, was responsible to the complainants for the estate in the hands of Mitchell, and that it was erroneous to decree against them without reference to the liability of her estate or representatives.

When two Administrators who give a joint bond, one dies, the other and sureties are sued in chancery for distribution by the heirs of the other Held that no decree should be given for compts. for more than the sum for which the other sureties were liable, deducting the liability of the deceased Adm'r. as one surety, if he had estate to that amount

The complainants being her personal and legal representatives, it was impracticable to include them in the decree against Mitchell and Collins, &c., but as all proper parties were before the Court, an enquiry should have been directed as to the estate left by her and belonging to her in her own right, and the result of such enquiry would enable the Court to determine the extent of the liability of the other sureties. If she left estate, to which the complainants would be entitled or had received, equal to one third of the decree against Mitchell, or of the estate in his hands, it would follow that Collins and Ashbrook should only be subjected to the payment of the other two thirds. If her estate should be inadequate to

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COLLINS, &c. vs CARLISLE'S HRS.

which had or would come to the hands of the complainants.

pay one third, they would be responsible for the residue, whatever it might be, after deducting her estate or such portion thereof, not exceeding one third, as would be subject, regarding her as a co-surety, to the complainant's demand. And for whatever sum upon these principles, they may be found responsible, a joint decree should be rendered against Mitchell and them, and Mitchell should be decreed to pay the residue.

It is certainly true that according to the strict rules of chancery practice, the complainants should have presented their case in view of the principles, which we recognize as applicable to it. But as no objection on this ground was made in the Court below, and as all proper parties are before the Court, we think it unnecessary to drive the party to a new suit or even to require additional pleadings. Complete justice in the whole case, we apprehend, may be done in the mode indicated.

We are not satisfied that there is any error in the decree in regard to the amount decreed against Mitchell. It is manifest that he appropriated the funds of the estate, which came into his hands, to his own use; and upon that ground he was properly charged with interest.

Nor have the defendants any cause to complain that a refunding bond had not been executed. The decree provides that no execution shall issue thereon, and that the same shall not bear interest until the next term of the Court, nor until a refunding bond shall be executed according to law, and with security to be approved of by the Court.

The decree is reversed and the cause remanded for further proceedingsa and decree consistent with the principles of this opinion.

Trimble for plaintiffs; *O'Harra* for defendants.

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Smith *vs* Roach's Executor.

PET. & SUM.

APPEAL FROM THE TODD CIRCUIT.

Foreign exchange. Bills of exchange. Notice. Evidence.

Case 6.

September 15.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated and judgment of the Circuit Court.

This is an action on a bill of exchange, by petition under our statute, instituted by Roach, as Cashier of the Branch Bank of Tennessee, at Clarksville, and revived in the name of his executor against Smith as endorser. The bill is for $2,500, drawn by C. M. Barker & Co., on Messrs. Robert & Williams of New York, in favor of Wm. Harlan, payable four months after date, and endorsed by him to B. D. Smith, the appellee, and by Smith to Roach, the Cashier of the Bank aforesaid, by which the bill was purchased, and endorsed by Roach, Cashier, to the Cashier of the mother Bank, at Nashville, and was endorsed by him to O. J. Cummin, Esq., Cashier, New York, and transmitted to him for collection. The jury, under the instruction of the Court, found for the plaintiff, and Smith has appealed to this Court.

Three questions are raised which we will notice:

An authenticated copy of a certificate of probate is sufficient evidence of a rightful appointment of an Executor in another State.

1st. That the evidence is not sufficient to prove Roach to be an executor. By the statute of 1812, (1 *Stat. Laws*, 674,) an authenticated copy of the certificate of probate is sufficient to prove that the plaintiff is a foreign executor. The fact that he has been appointed and qualified by the Court, is evidence that he was duly and *rightfully* appointed, and pre-supposes that all the previous requisites to a *rightful* appointment had been shown.

Notice of the dishonor of a bill of exchange is reasonable, if forwarded one day after the dishonor; each endorser has one day after notice, to forward notice to his immediate endorser.

2d. It is objected that there is no sufficient proof of due notice having been given of the dishonor of the bill for non-payment. That the notice might have reached Smith, the endorser, perhaps a day sooner by a direct rout from New York to his residence. The general rule which has been sanctioned by this Court, is that where the bill has passed through several hands by endorsement, and is

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SMITH vs ROACH'S EX'R.

dishonored, that each party has a day after he has received notice, to transmit notice to a preceding party, from whom he has received the bill, and especially if he resides in the same neighborhood or county where the other parties reside, and he the same time to his preceding party: *Smith's Mercantile Law*, 147, *side page*, 201;) *Rickford* vs *Ridge*, (2 *Camp.* 537;) *Darbyshire* vs *Parker*, (6 *East*, 3;). *Triplett* vs *Hunt*, (3 *Dana*, 126, *and the authorities referred to.*) And we believe it customary among bankers and merchants, where the bill is endorsed and sent abroad for collection ,for the Bank, agent or holder, to send the notices of dishonor to the place and party from whom he received it, for distribution, and he to the next. This course has been pursued in this case, and allowing the time of one day to each, the notice to Smith was reasonable, being as speedy as the course of the mail by Nashville, where the notices were properly sent, would justify.

It is not indispensable that a bill of exchange drawn payable any number of *days after date*, should be presented for acceptance until due, but if presented and not accepted, notice thereof should be given in reasonable time to the drawer, &c.

3d. It is objected that the bill was presented to the drawee for acceptance, and dishonored, and no notices given of the dishonor. And as proof of the fact the defendant relied on a memorandum or *noting* on the face of the bill, in the following abbreviated words: "Pro. n. a. April the 19th, 1842. JOHN D. CAMPBELL,
"*Not. Pub. N. Y.*"
which he proved by the plaintiff's witness, the President of the Bank of Tennessee, to mean, usually, that the bill had been presented by the Notary Public to the drawee, and noted for protest for non-acceptance, and further, that John D. Campbell, whose name was to the protest for non-payment, dated the 17th June, 1843, when the bill fell due, was in the same hand write, and he believed to be the same signature with that signed under the abbreviated note aforesaid. This evidence was all excluded from the jury by the Court, and a verdict found for the plaintiff.

—And if such a bill be presented and not accepted, though no protest be made or notice given,

The doctrine is well settled that a holder is not bound to present a bill to the drawee for acceptance, that is made payable a given number of days or months after *date*, until after it falls due, yet if he does present it for acceptance and the bill is dishonored, he is bound to give

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due notice to those whom he intends to hold responsible for its contents: *Bank of Washington* vs *Triplett*, (1 *Peters*, 25;) *Townsley* vs *Simrall*, (2 *Peters*, 170.) The reason of the rule is, that the drawer, if he has funds in the hands of the drawee, may immediately withdraw them, and the endorsers may be apprised of the necessity of taking immediate steps to secure themselves. They all have a right to be apprised of the true condition of things known to the holder. So if the acceptance be conditional or partial, notice must be immediately given to the other parties to the bill, of the character of the acceptance offered: (*Chitty on Bills*, 179; *Same*, 196.)

in a suit thereafter by the holder against an endorser, he may show by any competent evidence, the fact of refusal of the drawer to accept, (1 *Peters*, 25; 2 *Ib.* 170,) and the short note of the Notary, who afterwards made out the protest for nonpayment, entered on the bill, is competent evidence to go to the jury.

But the question arises, was the note or memorandum on the face of the bill competent evidence of the presentation and dishonor by the drawee, to be left to the jury with the explanatory evidence as to the meaning of the abbreviations. We think it was.

Whatever may have been the meaning, purpose or effect of *noting* the bill for protest formerly, or when it was introduced, it seems now to be the general course of business, well understood among bankers and mercantile men, for the holder to present the bill for acceptance or payment, and if refused, hand it over to a Notary Public to be again presented and protested if dishonored. He again presents it and demands acceptance or payment, as the case may be, and if it be dishonored he *notes* it for protest, or makes a note on the bill, in an abbreviated form, similar to the note or memorandum on the face of the bill in question, indicating the demand and protest for non-acceptance or non-payment, and the *day* when the bill was dishonored and reasons for the dishonor, if any are given, to which the Notary signs his name, as in the case before us; and he afterwards, on the same day, and sometimes days afterwards, draws out the protest at full length, and in solemn form, under his notarial seal, the *noting* serving as his memorandum.

This being the usual course and general practice among Notaries, the *noting* has become an official act, entitled to consideration as evidence of the fact of presentation and demand by the Notary, and dishonor by the drawee; and of such demand and dishonor the drawer and en-

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SMITH vs ROACH'S EX'R.

dorsers had a right to have notice. It is true it is said that a protest for non-acceptance of a foreign bill, is necessary, and cannot be supplied by *noting* or any other proof. This is true with respect to the holder's right to recover on such bill. To entitle him to sustain his action he must not only show notice of the dishonor, but also a protest regularly made out under the notarial seal, as such *protest* is essential to his action. But it does not follow that the defendant, against whom the recovery is sought, may not show, by any grade of evidence that is competent, that the bill was in fact presented and acceptance demanded and refused, and no notice given of the dishonor. The demand by the Notary and refusal by the drawee is the *fact* of dishonor, and of that *fact* it is the right of the drawer and endorsers to be apprised, and the duty of the holder to apprize them. And though it might be quite proper for the holder, who has possession and control of the bill, to be held to the strict proof of a protest, regularly drawn out, as the only evidence of the *fact* of dishonor, if the *fact* existed, and of which they had a right to be apprised, or to be excused from the payment of the bill, it would seem to be quite proper to allow them to prove the fact by any other evidence in their power. If they be not allowed to do so, then would the holder be enabled to escape from the consequences of his own negligence, by omitting to have the protest made out at length, or destroying or withholding it if it was.

The memorandum or note on the face of the bill, exhibited and relied on by the plaintiff as the evidence of his right to recover, shows that the bill had been in the hands of Campbell, who signed himself Notary Public, and was certainly Notary Public less than two months afterwards, when he protested the bill for non-payment, as such. From these facts it may be inferred that he was Notary Public at the date of the note or memorandum, and that the bill was placed in his hands as such, for demand and protest, and was demanded and refused, and noted for protest by him, officially, at the *time* of the refusal, and as a part of the *res gesta* of the transaction. As such, and being found on the face of the plaintiff's

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bill, it was competent for the jury to consider of it as evidence of the fact of presentment and dishonor of the bill.

This evidence being excluded from the jury by the Circuit Court, it is the opinion of this Court that the judgment of the Circuit Court be reversed and cause remanded, that a new trial may be granted without the payment of costs.

Underwood for appellant; *Morehead & Reed* for appellees.

Smith *et al. vs* Bland.

CASE.

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ERROR TO THE MARION CIRCUIT.

Administrator. Assets. Rents. County Court Justices.

Case 7.

CHIEF JUSTICE EWING delivered the opinion of the Court.

September 17.

THIS is an action on the case, brought under the 34th section of the act of 1797, (1 *Stat. Laws*, 664,) by Nancy Bland against Smith and others, as acting Justices of the Peace of the Washington County Court, for failing to take security from John Scanland, to whom they granted letters of Administration, on the estate of John S. Bland, dec'd., the ancestor of the plaintiff. It seems that security was offered and approved by the Court, and was in fact good at the time, and an attempt to execute a bond, which was signed by the Administrator and surety, but the paper signed was a blank, and was never filled up in the lifetime of the Clerk, who took it, and it now remains a blank in the office, by reason of which the surety was let out from responsibility by the Court, in a proceeding to subject the estate, and Scanland proved insolvent. A judgment was recovered against the Justices, for the amount due the plaintiff, as heir, and they have appealed to this Court.

Case stated.

Passing over the several objections raised to the judgment, all of which we deem unsustainable, we will notice only one, which is fatal to the plaintiff's right to recover.

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CAMPBELL vs WEAKLEY.

Rents of land received by an Administrator are not assets, and for them the sureties of the administrator are not liable, tho' the adminstrator is liable personally as trustee.

The Administrator took upon himself to rent out the lands and collect the rents for the same. And deducting the rents from the amount of the assets which came to his hands, it appears that he has disbursed in the payment of debts, and in the costs of administration, a much larger amount than the personal estate which he received. For the rents his surety, if security had been taken, could not have been made liable. They were not assets which he as Administrator had a right to receive. Though he might be made personally liable for the same, as trustee, his sureties could not, as they must be regarded as undertaking for his faithful administration of such assets only as he might rightfully receive as Administrator. And as his surety, if taken, could not be made liable, neither can the County Court Justices be made liable, as the plaintiff has sustained no damages by reason of their failure to take security.

The Justices of the county court are not responsible to distributees for failing to take surety from an Adm'r. where the suit is to recover for rents of land of the intestate.

The disbursements made by the Administrator in the payment of debts, &c., must be regarded as made out of those funds, which it was his duty to collect and disburse, in the absence of proof to the contrary, and the more especially as the personal assets first came to his hands.

The judgment of the Circuit Court is reversed, and cause remanded, that a new trial may be granted.

Shuck and Thurman for plaintiff; *Rountree and Fogle* for defendants.

CHANCERY.

Campbell *vs* Weakley.

ERROR TO THE SHELBY CIRCUIT.

Case 8.

Practice. Commissioners' Reports.

September 17.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Is a decree of the circuit court noted upon the minute book before entered at large upon the

IT may be a question whether a decree noted on the minute book as a decree, though signed by the Judge, can be regarded as a decree of the Court, until the same is entered at length upon the order book, and sanctioned by the Judge by his signature, as a decree, so as to au-

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thorize an execution upon it. But the question whether it is or is not a decree, cannot be raised in this Court, until there has been some adjudication upon the question in the lower Court by a motion or writ of error *coram vobis* to quash the execution.

order book, a decree upon which execution may issue, &c. ?—QUERE. But whether or not the question can not be raised here before it is made and adjudicated upon by the circuit court by motion, or writ of error *coram vobis* to quash the execution.

It is or it is not a decree. If it be no decree, then no appeal or writ of error lies to this Court upon it as such. If it be a decree, then this Court must affirm or reverse it as such. The 12th section of the statute of 1800, (1 *Stat. Laws*, 329,) after directing the manner in which the orders of each day shall be made up and signed by the Judge, proceeds, "but the record of the proceedings of said Court, on the last day of any term, shall be read and signed as aforesaid on the first day of the ensuing Court." "Nothing herein contained shall prevent the minutes of the Court before mentioned, from being read and signed each day, before the adjournment of the Court." Whether the authority here given to the Judge to sign the orders of the last day of the term, on the first day of the next succeeding term, and the sanction of the authority to sign the minutes as heretofore, will authorize execution upon the minutes thus signed before the orders are drawn out at length upon the order book and signed by the Judge, on the first day of the succeeding term, may be a question. But the question can only be raised by objection to the execution in the Court of original jurisdiction, on account of its premature issue, or issue without a judgment or decree.

Nor can the objection be sustained, that the decree was entered on the last day of the term, after the general order of a previous day, continuing all causes on the docket, there being no objection made in the lower Court to the entry of the decree, or injury shown. Besides we must presume that the Court did right until the contrary is shown, and to sustain the action of the Court, we should indulge in the presumption that the bill and papers were in the hands of the Court before the order for a continuance of all causes was made, and that it was not intended to apply to the case.

That a decree was rendered on the last day of the term of a circuit court and after a general order of continuance, is no ground of reversal, if there was no objection made to it; this court will presume that the papers were in the hands of the court before the general order of continuance was made, and that such order was not intended to apply to the case.

Nor can it make any difference whether the mandate of this Court, upon the reversal of the former decree, on the

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CAMPBELL
vs
WEAKLEY.

Either party has a right to file the mandate of this court in the inferior court, and the other party is bound to take notice of such filing, and the subsequent proceedings in the case.

appeal of the present appellant, was filed in the lower Court by him or by the appellee. Either had a right to file it, and when filed, he being in Court, was bound to take notice of the steps taken in the cause and of the amended bill filed, and especially as one of the grounds of reversal, upon his own appeal, was that he had not been named and proceeded against as administrator, in the former bill, though it appeared in the proof that he was administrator, and leave was allowed to the complainant, upon the return of the cause, to amend. Being in Court and bound to take notice of the return of the cause and of the amended bill filed, his duty was to answer it, and failing to do so, it was properly taken for confessed at the succeeding term.

The report of a Commissioner in a cause, though unexcepted to, should not be made the basis of the decree of the chancellor where it assumes an improper basis, not warranted by the facts appearing.

But there is error in the decree, as to the amount. Though the Commissioner's report was filed three years before, and no exception taken to it, that report makes the judgment in favor of the complainant the basis of the amount due him, and a copy of the judgment and proceedings are exhibited in the record, as the only evidence of the amount due him. That judgment carries interest from the 20th of September, 1841, when the Commissioner's report, by mistake, makes it bear interest from the 1st of January, 1841, which was no doubt the date from which the Chancellor made the calculation, so as to produce the amount of the decree rendered. Calculating the interest from the 20th September, instead of the 1st of January, 1841, down to the rendition of the decree, will produce twenty three dollars sixty eight cents, ($23 68 cents,) less than the amount of the decree.

For this error only, the decree is reversed and cause remanded, that a decree may be rendered as indicated, and the costs in this Court are divided.

Sprigg for plaintiff; *McHenry* for defendant.

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Winter *vs* Wheeler.

CHANCERY.

APPEAL FROM THE BOURBON CIRCUIT.

Practice in chancery. Interrogatories.

Case 9.

September 18.

Case stated.

CHIEF JUSTICE EWING delivered the opinion of the Court.

WHEELER was taken into the retail store of Winter, in July, 1817, as his principal salesman and book keeper, and was continued in said service, with the occasional assistance of Winter and others, subordinates, for some nineteen years. In 1832, Winter surrendered to Wheeler and his son Charles, the store and the entire profits thereof, requiring of them only to contribute out of the same, so much as was necessary to support his family. In the fall of 1835, Winter suddenly broke up the association and terminated the business, requiring the goods on hand to be sold at whatever they would command. Wheeler continued until 1837, settling up the business, when the books, papers and remnant of goods on hand, were delivered over to Winter, and receipts passed, in which Winter "acknowledged the receipt of $1,000 from Wheeler, which is a balance in full of all demands standing against him on his books, since July, 1817, to this date." After an angry contest in the Federal Court, in which Winter set up and asserted an old debt against Wheeler, which originated before he entered the service of Winter, and which Winter had purchased, and sought to subject to its payment the goods in a small store, which Wheeler, by the aid of friends, had established for his support, after he left the service of Winter, and which Wheeler had mortgaged to secure other more innocent and meritorious creditors, in which proceeding Winter had failed, this bill was filed in June, 1842, charging Winter with the embezzlement of his funds, while engaged in his service as his principal factor and book keeper, to the enormous sum of upwards of $70,000. The answer of Wheeler unequivocally denies the charges, and upon the hearing, the Chancellor dismissed the bill and Winter has appealed to this Court.

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WINTER vs WHEELER.

We have examined the heavy record in this case, with great care and attention, and judging charitably, we must say that the facts relied on by the complainant, are scarcely sufficient to authorize a plausible suspicion of guilt, much less a well grounded presumption, which would authorize a decree against the defendant, upon charges so serious as those exhibited. It would seem to be passing strange and wholly incredible, that Wheeler could have been guilty of the enormous embezzlement charged, and had retained, through so many years, the entire confidence of Winter, who had a constant eye over, and the general superintendence of the concern, except when absent in the east making purchases, and who was well qualified as a practical merchant and intelligent and astute man, to discover and detect any defalcation in the management of the establishment by Wheeler. And if the enormous amount charged has been fraudulently abstracted, to what purpose has it been applied by Wheeler? Where are the accumulated gains, the immense fortune? Or how has it been squandered? It has not been shown in the proof. But so far from it, it appears that Wheeler, after spending the prime of his life, in the service of Winter, is still poor and strugling for a bare support.

Evidence and circumstances from which the Court conclude that the charge of embezzlement is not supported by the evidence in the case.

There is no foundation for the suspicion that the change in the mode of keeping the books, by the adoption and use of a memorandum book, was resorted to by Wheeler the better to enable him to cover over and conceal his embezzlement as charged. Other well conducted establishments use memorandum books in the same manner and for the like purpose, as those used by Wheeler. Besides, it was well known to Winter that they were used, and the use of them never countermanded, nor any suspicion entertained that they were used for the fraudulent purpose now charged, until it became necessary to make out a case, and then for the first time, after the lapse of near twenty five years from the change, the use of them is siezed upon as evidence of a fraudulent purpose and intent.

And if the data of forty five per cent. gross profit upon the whole amount of the original costs of purchase, was correct, and all that the real profits fall short of the amount

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produced by the estimate, was in fact shown to have been abstracted, it would fall very far short of proving upon Wheeler the guilt of the abstraction. Winter himself was in the store frequently, superintending and aiding in the sales, and making entries in the books, so also were others, and the imputation might as well fall upon them, or some of them, as upon Wheeler. But the assumed data upon which the estimate is made, as well as the result, is as fallacious and deceptive as the data and estimate of profits made on paper by a sanguine man, upon entering on some untried enterprise. The data upon which the estimate is made, is obtained by ascertaining the advance upon costs of sales made for certain short periods selected, it may be, and pointed out by Winter to Bell, his private Commissioner, in the absence of Wheeler, and exhibited in his report. The profits or per cent. made upon such selected sales is an uncertain and deceptive criterion of the profits or per cent. made upon the entire sales of the whole period. For one week a merchant, by the sale of fancy articles or others, that happen to bear a high per cent. may make double the gross profits that he may make the next week, by the sale of as many goods in value, but which bear a less per cent. upon costs. Besides, no allowance is made or can be made for trimmings thrown in, or remnants or unsaleable goods, or goods that go out of fashion, and which cannot, in some instances, be sold at all, and in others can be sold only for cost or for costs and carriage, or a small per cent. above it. Besides, there are many articles that are received in barter, upon which no per cent. is made. Again, it appears that the store of Winter was commenced by the purchase of an old stock of goods upon disadvantageous terms, upon which it may be presumed that but little profit was made, as some of the articles remained on hand during the continuance of the concern. And the establishment was suddenly broken up by Winter, and the goods on hand, to a large amount, sold for costs and less than costs, which would subtract largely from the aggregate of profits.

Again, it is shown by the evidence of merchants, that about two or three failed in business, to one that succeed-

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WINTER vs WHEELER.

ed, during the same period. And among those that succeeded best, some of them purchased for cash, while Winter traded mainly upon borrowed capital, having exhausted his original capital in the purchase of a dwelling and Ware house, their profits varied only from twelve to twenty five per cent. And by a full estimate of profits from 1817 to 1820, during which period Winter attended more closely to the minutia and details of business in the concern, the profits exceeded only a fraction over twenty per cent. upon the costs. Besides, it appears that the profits of Winter exceeded the average profits made by other successful merchants at the same place, during the greater portion of the same period. Nor does the want of correspondence in amount of receipts entered on certain specified days, with the charges entered on the cash book, justify the presumption that the excess of the receipts over the entry in the cash book, was abstracted. In some of the items selected as specific acts of fraud, a full and satisfactory explanation is given by the evidence of living witnesses, the rest may be susceptible of explanation in the same way, and should be ascribed to mistake in the day of the entry, or to a distribution of the fund received among several days, or to a receipt in articles of barter, or to a receipt by offsetting a demand against the store, against a demand in its favor, when in fact no cash was paid, or if paid, was paid in a check or order, and not charged on the cash book till the money was received. By any of these ways the apparent discrepancy may have reasonably occurred, and should be presumed to have occurred, rather than to indulge in the uncharitable imputation of embezzlement, against a man who, for a series of years, has sustained the character of an *honest man*, and secured the confidence of his neighbors, as well as that of Winter himself, as a man of faithfulness, integrity and honor. We will not stop to enumerate and discuss the other numerous grounds relied on by Winter to sustain his charges, they are all equally, and in fact more futile than those commented on. Suffice it to say, that we are entirely satisfied that the Chancellor below properly dismissed the complainants bill with costs.

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Shall a party interrogated by his adversary before a master in chancery have the right to demand that the questions be propounded in writing? Held that such was the practice in England, and such is the correct practice here, otherwise as to witnesses.

But a question of practice as to the mode of interrogating the parties by the master in chancery, is urged upon the consideration and determination of this Court, though its settlement, the one way or the other, can in no wise affect or change the result in this case. The question is, shall a party to a suit, when examined by the master in chancery, be examined *viva voce*, or shall he have the right to require that the interrogatories shall be made out and furnished to him in writing, before he is required to answer.

It is believed to be the general, and perhaps the universal practice in this State, to examine the *parties* as well as witnesses, *viva voce*, writing down each interrogatory at the time, except in the cases pending in the Louisville Chancery Court, in which Court, by the rules of the former Chancellor, written interrogatories and cross interrogatories are required to be filed, and answers only to those interrogatories given. There has been no question heretofore raised in this Court, that we are aware of, as to the propriety of the *viva voce* examination of *parties* or *witnesses*, adopted and pursued in this State. And as justly remarked by the learned Chancellor, who decided this case, it is better calculated to search the conscience and elicit the truth, we should not feel now at liberty to change the practice as to witnesses, who, even in England, are sometimes examined by the master *viva voce*: (*Smith's Chancery Practice*, 147–8,) though never by the examiner or commissioner empowered to take their depositions. In the case of witnesses, if entangled or entrapped by an ingenious examiner, and made to speak what is untrue, they may be made to explain by a cross examination. But in the case of *parties* examined before the master, they have no such opportunity afforded them, and may, if ignorant and unacquainted with the force of language, be examined and entrapped by a wiley and cunning antagonist, into unintentional contradictions and admissions variant from the truth, which may expose them to a prosecution for perjury. And though as to the parties, if they submit to a *viva voce* examination, no objection can be made to the course pursued by the master, and the more especially, as it is unquestionably the better

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WINTER vs WHEELER.

practice to search the conscience and extract the truth, unvarnished by the aid of counsel; yet it is unquestionably the English practice, for the counsel to prepare *written interrogatories*, which are submitted to the master for his approval, and when approved, are engrossed, and the original or a duplicate, handed over to the party to be examined, who being allowed reasonable time, returns his answer to the same, to which he is sworn; (*Smith's Chancery Practice from* 122 to 125, *and the authorities cited.*) If additional interrogatories are deemed essential, they may be prepared in like manner. But this being the English practice, from whence we derive our rules of jurisprudence, and the rule as to the examination of *parties* litigant, by prepared written interrogatories, approved by the master, being a rule necessary to secure a right and protect the party examined from an obvious injury to which he may be exposed by an oral examination, if he insists upon being examined by written interrogatories, prepared, approved and submitted beforehand, he has a right to demand it, and ought not to be deprived of the right.

Interrogatories to a party before the master, are in the nature of interrogatories in a bill or answer in chancery, and the answers are evidence to the like extent ag'st the party making them.

Interrogatories to the parties litigant, are in the nature of interrogatories in a bill or answer, and are propounded for the like object, and the answers used to the like extent, and no other. They are substituted in the place of written interrogatories in a bill or answer, as the more convenient mode, especially in complicated account cases, to extract the truth from the parties where it may be confined to their own knowledge, and save the necessity of taking proof when it is not. As interrogatories are always propounded in writing in a bill or answer, so should they be before the master, if the party interrogated desire it. It was error therefore to the prejudice of Wheeler, to require him to submit to an oral examination, or in refusing him the right to have the interrogatories propounded approved by the master, and submitted for answer, as required by the English practice.

But, as heretofore intimated, the chancellor's decision was right upon the merits, and is therefore affirmed.

The appellant appeared and argued his own cause; *Robinson & Johnson* for appellee.

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Fry *vs* Breckinridge.

TRESPASS.

ERROR TO THE FAYETTE CIRCUIT.

Rents. Distress warrants. Tender. Executor and heir. *Case* 10.

JUDGE MARSHALL delivered the opinion af the Court. *September* 19.

THIS action of trespass was brought by Breckinridge, to recover, under the 3d section of the act of 1748, concerning rents, &c. (*Stat. Laws*, 1352,) double the value of a parcel of hemp, his property, which had been taken under a distress warrant for rent, when none was due and in arrear. But the declaration contains a second count, *de bonis asportatis*, without reference to the statute. Case stated.

The defendant pleaded not guilty, and also that the plaintiff, as her tenant, was indebted to her on the 31st day of December, 1844, the sum of $37 50, for rent in arrear, &c., which he refused to pay, and that on that day she procured a warrant, &c., which was levied, &c. The plaintiff for replication to the second plea, denied that he was indebted to the defendant for rent in the sum of $37 50 on the 31st December, 1844. And issues being joined, the law and fact was submitted to the Court without a jury.

It appeared in evidence, that the plaintiff was tenant of the defendant for one year, commencing on the first day of January, 1844, at a rent of $150, payable quarterly; that after sun down on the 31st of December, 1844, the defendant applied for, and obtained the distress warrant, which was written by candle light; and that by her direction, it was immediately, on the same evening, levied on a parcel of hemp on the demised premises, which was spread out on the ground for the purpose of being rotted; that the plaintiff, with his family and furniture, removed from the premises on the evening of the 31st of December, and was removing when the warrant was levied, it being then dark, but that his stock remained until after the sale, made under the warrant. It was further proved, that at the sale no person would bid for less than the whole lot or parcel of hemp, The facts appearing in evidence.

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FRY vs BRECKINRIDGE.

which was sold at a fair price, for $81, of which $40 61 was the excess above the rent due, with interest and costs; and that for this excess a bond was taken, with security, payable in three months to the plaintiff, Breckinridge. A receipt from the defendant, by her agent, was also exhibited and proved, which, bearing date October 3d, 1844, acknowledged payment of $37 50, "for the quarter's rent due the first instant.."

Judgment of the Circuit Court.

This being the substance of all the testimony, as presented in the bill of exceptions, the Court gave judgment against the defendant for $162, being precisely the double of the sum for which the hemp sold, and which was proved to be its value. So that if the judgment should be enforced, Breckinridge will get $162 by the judgment, and $40 60 from the sale of the hemp, besides the payment of his rent of $37 50, making in all $240 10 for the seisure and sale of his hemp worth $81.

The bill of exceptions concludes with the statement, "and this being all the testimony in the case, the defendant excepts to the opinion of the Court, and prays, &c." But the bill of exceptions states no opinion of the Court, and the exception should perhaps be regarded as being taken to the judgment. It does say, however, immediately before the conclusion just recited, and immediately after the detail of the evidence: "The only question under these facts is, whether the distress warrant was legally issued and levied on the day as set forth. And if the Court of Appeals shall be of opinion that it was improperly issued, they will reverse the case, and if otherwise, they will affirm, and to present this point, this bill of exceptions has been agreed."

It is apparent upon the face of the record, and is in effect conceded in the argument, that the judgment is based upon the third section of the act of 1748, which in the cases to which it applies, gives to the person whose property is distrained and sold, an action of trespass or on the case, and double the value of the goods and chattels so distrained and sold. It may be true that the counsel on both sides, between whom the bill of exceptions was agreed, concurred in the opinion that the application of the statute to the case, depended solely upon the ques-

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tion whether it was legal to issue and levy the warrant at the precise time when it was done; and that although the illegality may have consisted entirely in the fact that it was premature, by a few hours; and although the levy might have been lawful if made on the next day, yet the statute, by its inflexible mandate, gave the action and the double value. It is also probable that this point being conceded by the counsel, may not have been discussed, and was neither considered nor formally decided by the Court. But it is nevertheless equally true, that the question of the application of the statute is in fact and necessarily involved in the judgment for which there is no reasonable ground, unless it can be sustained by the statute.

This Court is not to affirm a judgment of a circuit court upon one point made and discussed in that court, though it concur with that court, when there are other points clearly against the judgment.

Are we then precluded by the restrictive clause in the bill of exceptions, from enquiring into the applicability of the statute to this case? And must we, upon deciding that the issuing and levy of the distress warrant were illegal, affirm a judgment founded upon an application of the statute, though we should be clearly of opinion that notwithstanding the illegality of the distress, the statute is not applicable to the case, or that if it were applicable the judgment is for too much? If we are bound by the restrictive clause to decide the case upon a partial decision of the question of law arising on the facts and embraced in the assignment of errors, it might perhaps be insisted that we should adhere to the letter of the clause. And according to its letter, we are required to reverse if we shall think the distress warrant was improperly issued, &c. As the judgment was certainly based upon the opinion that the distress warrant was illegally issued and levied, we are thus required to reverse if we concur in opinion with the Circuit Judge on the only point which we are to decide; and on the other hand, we must affirm if we think he erred. This is obviously a mistake, and should, as such, be disregarded; and so must we disregard the presumed misconception of counsel in supposing that this case rested on the single question of the illegality of the distress itself, or that by stating that, as the question on which reversal or affirmance was to depend, other questions essential to the decision, and plainly arising on the facts, were to be disregarded.

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FRY vs BRECKINRIDGE.

A distress warrant cannot issue or be levied until the day after the rent falls due. (*Hardin*, 297; *Thomas' Coke*, 254, *note C.*) But it may be made after the rent falls due, according to the statutes now in force, of both England and Ky. or before under the particular circumstances pointed out, (2 *St. Laws*, 1352,) not existing in this case.

Upon the question as to the legality of the distress when made, we are of opinion that whether the rent was due on the 31st of December, 1844, or on the 1st of January, 1845, it was unlawful to issue and levy the distress warrant upon the 31st. It is an ancient and well settled principle of the law of distress for rent, that distress cannot be made until the day after the rent falls due: *Gano* vs *Hart*, (*Hardin's Rep.* 297; 3 *Thomas' Coke*, 254, *note C.*) In the book last cited, page 255, 47 *b*, it is said in the text: "But it is to be observed, that for rent due the last day of the term, the lessor cannot distrain, because the term is ended;" and in note 1, to this passage by Hargrave, the reason or proof is given: "For one cannot distrain the same day the rent grows due, but it must be the day after: (21 *H. b.* 40 *Vid.* 14 *H.* 4, 31, *Hal. Mss.* On this account as intimated in the text, some lessors reserved the last half years' rent at some day before the end of the term, so that there might be a distress. To obviate the inconvenience arising from the combined operation of the two principles, that distress could not be made on the day the rent falls due, nor after the expiration of the term, modern statutes both in England and here, have extended the time of making distress, so that the right of making it is in no degree affected, though the opportunity of exercising it may be lost, by the expiration of the term. But this extension of the time of making distress did not authorize it to be made at an earlier period than was before lawful; and it is only under particular circumstances that the landlord is authorized by statute to seize the goods of his tenant by way of attachment or distress, before the time of payment arrives: see 7th and 8th section of the act of 1748, (2 *Stat. Laws*, 1353.)

We do not understand this case as being brought within the statutory provision for making distress before the rent is due, and are, therefore, of opinion, upon the authorities above cited and others, (*Com. Dig. Dristress, A.* 2; 1 *Saund.* 287,) that the issuing of the distress warrant on the 31st of December was premature, and that the levying of it on that day, which constitutes the taking complained of, was illegal.

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Distress for rent *may* not be made *in the night*, (3 *Thomas' Coke*, 254, *and* 142 *a*,) between sun rise and sun set, (*Ib. note C. page last cited*,) that tenant may have an opportunity to tender the rent.

It is also laid down by Coke and other authorities, that distress for rent cannot be made in the night, but in the day time: (3 *Thomas' Coke*, 254, 142 *a*,) which in note C, same page, is said to be between sun rise and sun set: (*Mirr. C.* 2; *S.* 26, *and* 7 *Co* 7 *a*.) And this, as the note says, to give the tenant an opportunity of preventing the distress by tendering the rent. If then it were true that the rent became absolutely due and payable at sun down on the 31st day of December, and even if distress could be legally made on the same day on which the rent became due, it could not properly have been made in the night, unless under some special circumstances, and mode of proceeding which might authorize it. The law does not, in general, authorize a division of the day, by which the ordinary remedies for coercing a debt may be commenced on any part of the day on which it falls due. In the present case, we are clearly of opinion that as the lease commenced expressly on the 1st day of January, and was for one year, it expired precisely at the end of the year, that is, at midnight of the last day. And it would seem that the rent being to be paid quarterly, without other designation of time, it was due at the expiration of each quarter, that is, at the last moment of the last day. In *Duppa* vs *Mayo*, (1 *Saunders*, 287,) Lord Hale said, "that although sun set was the time appointed by law to demand rent, to take advantage of a condition of re-entry, and to tender it to save a forfeiture, yet the rent is not due until midnight." And further, "if the lessor seized of the fee, die after sun down and before midnight, his heir and not his executor, shall have the rent." And although this position of Lord Hale's with respect to the consequences of the lessor's death, is said to have been denied or disputed, the note, (1 *Saund.* 288, *c. note*, 17,) shows that, in the opinion of Williams, the learned annotator on the text, the cases referred to do not contradict the position. A comparison of the authorities upon this particular point, would carry us greatly beyond the limits of the present case, in which it is not absolutely necessary to determine the prior question, whether the rent was due at sun down or not until midnight, since in either case, no distress could properly be

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FRY
vs
BRECKINRIDGE.

made until the next day. We would remark, however, that the fact that sun down on the last day is fixed by the law, as the proper time for a demand or tender, when the one or the other is necessary to give a right of entry, or to save a forfeiture, does not necessarily prove that the rent is to be considered, (for all purposes at least,) as being due at sun down. If it were certainly not due until midnight, still as the demand or tender could not be made conveniently at that very moment, and as, moreover, the night, that is, the interval between sun down and sun rise, seems to have been regarded as an unreasonable and inconvenient time for either demanding or offering payment, the necessity of making the demand or tender about sun down on the last day, or about sun rise on the following day, as the points of time nearest to the precise moment when the rent falls due, would seem to be obvious, and the greater safety in making the demand or tender before, rather than after the precise moment, would seem naturally to lead to the practice and to account for the requisition by which sun down on the last day is fixed on as the proper time for a demand or tender of rent, and especially as the presumption would be, that if it remained unpaid at sun down, it would not be paid before or at midnight. Then as the rent is payable for past use and occupation, which constitute the consideration, the natural conclusion would seem to be, that as a mere debt or pecuniary demand, it would not become absolutely due and enforcible until the full expiration of the period for which it is payable, and, therefore, is not coercible by action or distress until the day after. But however this may be in point of reason, distress for rent in the ordinary form, is not in point of law, allowable until the day after that on which it falls due, and therefore, the distress, that is, the seizure in this case, was illegal, and may have constituted a cause of action for the recovery of damages.

The mere fact that a distress for rent was *illegal* within the 3d sec. of the statute of 1748, does not authorize

But the mere illegality of the distress, is not sufficient to bring the case within the third section of the act of 1748, which fixes double the value of the goods distrained, as the criterion of recovery. That section enacts, "that in case any distress and sale shall be made under

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judgment for double the value of the distress made. There must also be a sale before rent falls due, to authorize the double damages.

color of this act, for rent pretended to be in arrears and due, when in truth no rent is in arrear, or due," &c., the party shall have remedy, &c., "and shall recover double the value of the goods and chattels so distrained and sold." It is only where there is a sale as well as a distress, no rent being due, that this remedy and recovery are given. In this case, the rent was certainly due before the sale, and as has been seen, it is a nice and difficult question whether it was not due before the distress was made. The statute applies to cases in which a distress and sale are made for rent pretended to be due, when in fact there is no rent due. It does not apply to a case in which there is a real and not a pretended or fraudulent claim of rent, and a mistake of a few hours as to the time when the rent was due, or when the proceeding by distress might be initiated. In its letter it does not apply to a case in which the rent claimed is due before the sale under the distress. And if it had given the remedy in a case of a distress only, without reference to the sale, we think it doubtful whether it should be applied in a case in which the rent distrained for is actually due on the day on which the distress is made, and might have been demanded or tendered, (if these acts had been essential,) before the warrant was levied or even issued. Such a case would not be within the spirit of the statute, but the present case is neither within its spirit nor its letter. Whether if the statute applied to the case, the judgment for the double value should not be diminished or credited by so much as the plaintiff had already received of the value of the goods, is a question which need not be decided, as we are satisfied that the statute referred to gives no support either to the judgment or the action.

From what has been said, it appears that if the fact in issue upon the replication, denying that the rent was due on the 31st of December, could have been decided for the plaintiff, such a decision would not have authorized a judgment for him on the first count, which is under the statute; and that although it should have been decided for the defendant, this would not have entitled him to a judgment on the second count, which is merely for an

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COMMONWEALTH *vs* TRUSTEES HOPKINSVILLE.

illegal taking, &c. And although the plaintiff might have been entitled to some damages under this count, yet as the damages were clearly fixed by the Court, not in reference merely to the actual injury and its circumstances, but according to a rule erroneously supposed to be furnished by the statute, we are of opinion that the judgment being founded upon this error and infected by it, is itself erroneous.

Wherefore, the judgment is reversed, and the cause is remanded for a new trial in conformity to this opinion.

Robertson and Payne for plaintiff; *Pindell* for defendant.

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INDICTMENT. **Commonwealth *vs* Trustees of Hopkinsville.**

ERROR TO THE CHRISTIAN CIRCUIT.

Case 11. *Indictments. Trustees of towns. Jurisdiction.*

September 19. JUDGE BIBB delivered the opinion of the Court.

Case stated.

THIS writ of error is prosecuted to reverse an order of the Christian Circuit Court, quashing an indictment against the defendants in error, as Trustees of the town of Hopkinsville, for permitting the Main street in said town to be obstructed by piles of wood, and divers quantities of rubbish, &c.

The Trustees of towns in Kentucky are authorized to require the streets to be kept in repair by the inhabitants thereof, and for failing to do so, are liable to indictment, and to *fine* and *imprisonment* by the common law.

Trustees of towns are authorized by statute, (2 *Stat. Laws.* 1506,) to cause the streets to be cleaned and repaired by the inhabitants thereof; and the act further provides, that if they, the inhabitants, or any of them, shall refuse to clean and repair the part of said streets assigned them, it shall be lawful for said Trustees, or a majority of them, to hire the cleaning and repairing of said streets, and levy the price thereof on the person or persons so failing and refusing, &c.

Ample power is thus given the Trustees of towns to cause the streets thereof to be kept clean and in repair, and having the power, it is very clearly their duty to use it. And for their failure to do so, and to cause the streets

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to be kept in repair, there can be no doubt, we apprehend, that they would be subject to be proceeded against by indictment and punished.

As the punishment of trustees of towns for failing to cause the sts. to be kept in repair is fine *and* imprisonment, this court has no jurisdiction since the statute of 1841, to revise a judgment of the circuit court in such cases except at the instance of the defendant.

But as there is no statutory provision authorising such proceeding and prescribing the punishment, the indictment in this case can only be sustained as an indictment at common law, and such it was evidently intended to be. The offence charged in the indictment, is for suffering a nuisance in a public street, which, as we have seen, it was the duty of the Trustees to have had abated or removed At common law such an offence is punishable by fine and *imprisonment:* (2 *Chit. Crim. Law*, 343, and authorities there cited;) (1 *Salkeld*, 359; 1 *Hawkins*; *Pleas of the Crown*, 695.) And as this Court has no jurisdiction in a criminal or penal case, in which *imprisonment* constitutes any part of the punishment for the offence charged, except in behalf of a defendant against whom judgment has been rendered, as provided by the act of 1841, it follows that the judgment of the Circuit Court in the case before us, although in our opinion erroneous, cannot be revised by this Court.

Wherefore, the writ of error must be quashed for want of jurisdiction in this Court.

Cates, Attorney General, for Commonwealth; *N. E. Gray* for defendants.

Broadwell *vs* Swigert *et al.*

CHANCERY.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Steamboat Collisions. Damages. Common Law. Chancery attachment.

Case 12.

September 21.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

THE owners of the steamboat Bob Letcher filed their bill in the Louisville Chancery Court, to attach the steamboat Hard Times, to answer damages sustained by the former boat, on a charge that she had been run into and sunk on the Ohio river on her downward trip from Frankfort to Louisville, by the Hard Times, in her ascending course on the river. A jury was summoned and sworn

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BROADWELL vs SWIGERT *et al.*

to inquire into and determine upon the facts submitted to them, and the Chancellor gave the following instructions to them:

Instructions of the court to the jury.

"1st. If they believe that the steamer Bob Letcher was owned by the complainants, and the steamer Hard Times was run into her, and the Letcher sunk thereby, through the wilful misconduct, bad management, want of proper skill, or carelesness of the officers of the Hard Times, without any similar misconduct, immediately conducing to the collission, on the part of the officers of the Letcher, the jury ought to find for the complainants the amount of damages they have sustained from the sinking of their boat.

"2d. They have a right to believe from the evidence, that the collision between the two boats did not proceed from mere accident, but that one or both were in fault, and if they believe from the evidence, that the proximate cause of the collision, was brought about by the mutual fault of the officers of both boats, and that by such united fault, the boats were so placed that collision could not have been avoided by the exercise of ordinary vigilance and skill, on the part of either, then they should *apportion* the loss between the owners of the two boats, by finding for the plaintiffs one half of the damages they have sustained by the sinking of the Letcher."

The jury found a verdict for one half of the value of boat Bob Letcher, and a new trial being asked by the owner of the Hard Times, and overruled by the Chancellor, and decree rendered, he has brought the case to this Court for revision.

The instructions by the Court to the jury, involve the only legal questions to be decided by this Court. So much of the first clause of the second instruction, as informs the jury that they have a right to believe that the collision between the two boats did not proceed from mere accident, but that one or both were in fault, was justified by the proof now in the record, and the Chancellor did not err in refusing to give the instruction to the jury asked by the defendant's counsel, that they should find for the defendant if they believed that the collision was accidental, as the proof did not authorize the conclusion

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that it occurred "by *vis major*, or physical causes exclusively, and without any negligence or fault," on the part of either of the boats. But we are satisfied that the Chancellor did err in instructing the jury that they should *apportion* the damages equally between the owners of the two boats, in case they should believe that both were in fault.

We are aware that this is the rule in the Admiralty Courts of England, which are governed by the civil law, in cases of a conflict between ships, sailing on the ocean. It is also the rule by the ordinances of many of the kingdoms of continental Europe. And in others, in such cases, the damages are apportioned according to the degree of fault.

Rule of liability for assessing damages for injuries done to vessels at sea, is not the rule of liability for injuries to steamboats on the Ohio; the first is governed by admiralty law, the latter by the common law.

But neither of these rules are adopted by the common law Courts of England; but on the contrary, if the conflict and injury was purely accidental and unavoidable, or if the officers of both vessels were in fault, neither can recover. And the common law rule is the rule by which this Court and the Courts of Kentucky are to be governed. In the case of *Handaysyde et al.* vs *Wilson*, Best, C. J. of Kings Bench, says, "the material question in this case, is not which of the vessels first struck the other, but whose negligence it was by which the injury was caused. If it was the result of accident, owing to the darkness of the night, the plaintiffs must look to their underwriters, and cannot recover in this action. So also if both *parties* were in the *wrong* the *plaintiffs must fail* in this action:" (14 *English Common Law Reports*, 431.) In the case of *Luseford* vs *Large*, for an injury charged to be done, in upsetting the plaintiff's wherry or small boat on the river Thames, by the steamer Albion, (24 *Eng. Com. Law Rep.* 394,) Duncan C. J. said, "you must be satisfied that the Albion was going at too great speed and thereby occasioned the swell, and you will have to say whether it was that swell *alone*, which occasioned the injury, or whether *it is doubtful* that such was the case, for that will be enough to prevent the plaintiff's recovering. If you are satisfied that the defendant's vessel occasioned the injury, by its improper speed, and that the *plaintiff was not in fault and did* not contribute to

In common law, if the officers of two vessels coming in collision were both in fault, neither can recover, so if the collision was purely accidental and unavoidable.

1 Gal. 365

24 Eng. C. L. 580

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BROADWELL vs SWIGERT et al.

his misfortune, by his improper management of his boat, then you will find for the plaintiff, and give him such damages as you consider him entitled to."

In the case of *Pluckwell* vs *Wilson*, (*Same book*, 268,) which was the case of a conflict between a chaise and a carriage, and injury to the former, Justice Anderson "left it to the jury to say whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servant, without *any* negligence on the part of the plaintiff himself; for if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict."

And in the case of *Wolf* vs *Beard*, (34 *Eng. Com. Law Rep.* 435,) which was an action for the negligent driving of a Cabriolett by the defendant's servant, by which the plaintiff was run over in the street, and injured, Coleridge J., (in suming up,) said, "If the plaintiff has contributed to the accident by her own neglect, she cannot recover." The same rule is adopted in the Courts of Westminster, as appears by these authorities, in the case of a conflict between sea vessels and land carriages. The American Courts, which are governed by the common law, adopt the same rule as to the plaintiff's right to recover.

In the case of *Lucy Law* vs *Crombie*, (12 *Pickering's Rep.* 177,) which was an action on the case to recover damages for alledged negligence in the defendant's servant, in driving a four horse sleigh, by which the plaintiff was run over, the Court say, "we consider the rule now well settled, that to enable the plaintiff to recover, he must not only show some negligence and misconduct on the part of the defendant, but ordinary care and diligence on his own part, and cites *Buterfield* vs *Forister*, (11 *East*, 61;) *Harlow* vs *Hemeston*, (6 *Cowan*, 191;) and *Smith* vs *Smith*, (2 *Pick.* 621.)

And the same rule is adopted and settled as the common law rule in Pennsylvania, in 6 *Wheaton's Rep.* 321.

And Chancellor Kent, in the 5th edition of his Commentaries, published in 1844, 231, changes his former text, and after laying down the rule adopted by the marine law, and foreign ordinances and jurists, as to the appor-

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tionment of the damages, where there is fault on both sides, he remarks: "But according to the English and American rule, in the Courts of common law, if there be fault or want of care on both sides, or without fault on either side, neither party can sue the other;" and he cites the following authorities: *Vanderplank* vs *Miller*, (1 *Moody and Malkin*, 169;) *Venuall* vs *Gerner*, (1 *Cromp. and Meeson*, 21;) *Simpson* vs *Hand*, (6 *Wharton*, 311;) *Story Justice in the case of the Paragon; Philips on Ins. vol.* 2, 183; *Abott on Shipping, by Story, edit.* 1829, *page* 354.

It is not in the power of the judiciary of Kentucky to adopt the civil law or the marine code of Europe, in ascertaining the liability of steamboat owners for injuries done by collisions on the western waters.

If it be conceded, as insisted on by the counsel for the appellees, that the rule adopted by the civil law and marine codes of Europe, is more equitable and just, and better calculated to prevent the sacrifice of human life and property, by the conflict between steamers, so frequently occurring on our western waters, than the rule adopted by the common law, it is not the province of this Court to adopt the former, or change the latter, but the province of another department of the government.

—And though to the chancellor is given jurisdiction of such cases, and power to attach the boat, the common law principles must govern his adjudication.

Nor do we think that the fact that the trial of the question was brought under the cognizance of the Louisville Chancery Court, can authorize that tribunal to adopt any other than the common law rule in the trial of the case. Cognizance was given to that tribunal, by the statute, for the object and purpose only, of facilitating the remedy, by attaching and securing the boat, so that it might be subjected to the payment of the damages, that the plaintiffs might have a *right* to recover. But the statute did not attempt to alter or change the rules of law by which their right was to be ascertained and determined, nor to prescribe to the Chancellor any other rule of adjudication, upon the question of the plaintiff's *right*, than those given to the common law Judge.

The decree of the Chancellor is, therefore, reversed, and cause remanded, that the verdict of the jury may be set aside and a new trial granted.

Pirtle and Duncan for appellants; *Loughborough* for appellees.

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INDICTMENT.

Ashlock *vs* Commonwealth.

ERROR TO THE FAYETTE CIRCUIT.

Case 13. *Jurisdiction. Faro Bank. Gaming. Commonwealth's Attorneys.*

September 21. JUDGE BIBB delivered the opinion of the Court.

Case stated.

ASHLOCK was indicted in the Fayette Circuit Court for setting up and keeping a gaming table or Faro Bank, at which money, bank notes and property were bet, won and lost; and a verdict and judgment having been rendered against him, he has brought the case to this Court for revision.

Various objections were made to the proceedings in the Court below, and are now presented for consideration in this Court.

And 1st. It is contended that the Court below had no jurisdiction.

In February, 1845, an act was passed by the Legislature, conferring upon the City Court of Lexington exclusive jurisdiction of all pleas of the Commonwealth, arising within the limits of the city of Lexington, except cases of felony. As the offence charged in the indictment in this case was committed within the limits of the city of Lexington, it is insisted that after the passage of the act referred to, the Fayette Circuit Court had no jurisdiction of it. But we are not prepared to give that act so broad a construction. At its passage the case was pending in that Court, which had jurisdiction to hear and determine it. As no provision is made in the act for the removal or trial of cases of this kind then pending in the Fayette Circuit Court, we are not authorized to presume that it was the intention of the Legislature to deprive that Court of jurisdiction.

The exclusive jurisdiction conferred upon the City Court of Lexington to

The exclusive jurisdiction conferred upon the City Court, must, we think, have reference to cases arising subsequent to the passage of the act, or to cases or proceedings subsequently to be commenced or instituted.

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2d. It is contended that the case had in effect been dismissed when process issued upon the indictment, and was served upon the defendant.

It appears that at the March term, 1844, no process having been served upon the defendant, the following order was made in this case:

"On motion of the Commonwealth's Attorney, it is ordered that this case be struck off the docket, with leave to reinstate it hereafter by motion."

In May, 1844, further process issued upon the indictment, and was served upon the defendant; and afterwards, at the September term, the case, on motion of the Attorney for the Commonwealth, was reinstated upon the docket.

hear and determine cases of breach of the penal laws of the State, except felonies, did not take away the right of the Fayette Circuit Ct. to decide all cases then depending in that court for breaches of the penal laws.

An order striking a suit from the docket, made on motion of the plaintiff, and without reservation or qualification, we should be inclined to regard as a voluntary dismissal or discontinuance, and as placing the case, after the term when the order was made, beyond the power of the Court. But here the right to reinstate the case upon the docket being expressly reserved, the order, we think, should not be construed as a dismissal or discontinuance, but as a mere removal, or omission of the case upon the docket. If right in this construction of the order, the case was still in Court, and the issuing and service of process before it was replaced upon the docket, was not unauthorized or invalid.

An order striking a cause from the docket, on motion, shall be regarded as a discontinuance thereof; but on reservationof the right to reinstate the case, should not be construed to be a dismissal or discontinuance.

The order is, however, in our opinion, unusual, and we would not be understood as approving such a rule of practice, perceiving no necessity, nor sufficient reason for it, and it may have the effect to delude and entrap litigants.

3d. An objection was made to the Judge who tried the cause, upon the ground that he as Attorney for the Commonwealth, had prepared the indictment, and was interested in the fine that might be recovered and collected. The objection was properly overruled. As to the first branch of it, it is not of a character deserving consideration; and it is a sufficient answer to the second, that it is not true in point of fact.

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ASHLOCK vs COMMONWEALTH

Attornies for the Com'th. are not entitled, under the statute, to any part of the fine imposed for keeping gaming tables, &c., unless they prosecute to *conviction*.

The provision in the statute is, that any prosecuting Attorney, who shall prosecute any person to *conviction* under the act, shall be entitled to 25 per cent. on the amount of such fine as shall be collected. The mere fact that the indictment was found while the Judge was the Attorney for the Commonwealth, entitled him to no part of the fine that might be recovered.

But whether if the fact had been as stated, and the Judge would have been entitled to a portion of the fine that might be recovered, the objection could have been rendered available by the defendant, it is not necessary to decide.

4th. It is objected that the Court misdirected the jury as to the law of the case, and that the verdict was not sustained by the proof.

The proof is, that the defendant dealt the game of Faro in the city of Lexington. That betters deposited with him bank notes, and received from him ivory checks, indicating certain amounts, and that these checks were bet upon the game as the representatives of money or bank notes, and were so recognized by both parties. When the better ceased betting, if he had checks he received from the defendant, in bank notes or money, the aggregate amount which they indicated. That the checks were of no value, except for the purpose for which they were used.

The betting of checks or counters, at a Faro Bank, which is agreed and understood by the parties, represent money or bank notes, and for which money or bank notes is paid by either winner or loser, is a violation of the statute, and if proved, sustains the charge of keeping a Faro Table at which money and bank notes was bet.

It is contended that the betting of these checks, although used as the representatives of bank notes, was not a betting of bank notes, any more than the betting of bank notes, which are the representatives of money, would be a betting of money. It is true it has been decided by this Court, *Prior* vs *Commonwealth*, (2 *Dana*, 298,) that a charge of keeping a Faro Bank, at which money was bet, is not sustained by proof that bank notes were bet. But there is a very obvious distinction, we think, between that case and this—between betting bank notes and the betting checks, as used in playing the game in this case. In one case the bank note is a thing of value, wholly irrespective of betting at a Faro Bank, and is, in point of fact, the thing and the only thing that is bet. If lost, the party looses the bank note and nothing else. In the other

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case, the check is not, in reality, the thing bet, for if so, nothing of value would be bet, the checks being of no value except in playing the game. But the check in this case was used and staked merely to indicate the amount of money, or rather bank notes, (as the betters had deposited with the defendant bank notes for the checks,) which the better staked, and if he lost, it was not in reality a loss of the checks, but the loss of the bank notes, to the amount which the check denoted. The checks were mere counters in playing the game. In this view of the case, the charge in the indictment that the defendant kept a gaming table, at which money, bank notes and property were bet, won and lost, is fully sustained by the proof. The proof is, that bank notes were bet, won and lost.

In regard to the objection that the Court misdirected the jury as to the law of the case, we need only remark, that no error is perceived in that respect, to the prejudice of the defendant.

But lastly, it is perceived that the judgment is for $600. The fine imposed by the statute, is only $500. No notice appears to have been taken of this error in the Court below, nor has it been noticed by counsel in this Court and expressly relied on; but as it is a palpable error and confessed by the Attorney General, the judgment is reversed and the cause remanded, that a judgment may be entered for $500.

$500 is the fine imposed by the statute for keeping a Faro Bank.

Pindell for plaintiff; *Cates, Attorney General,* for Commonwealth.

Bridgeford *vs* The city of Lexington.

WARRANT.

ERROR TO THE LEXINGTON CITY COURT.

Retailing spirits. Witnesses. Judgment.

Case 14.

JUDGE BIBB delivered the opinion of the Court.

September 22.

THE judgment in this case, in the opinion of this Court, is erroneous and must be reversed, and for the following reasons:

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BRIDGEFORD vs CITY OF LEXINGTON.

1st. The warrant or summons issued by the Clerk of the City Court, and which is the foundation of the proceeding, is defective and insufficient. It requires the defendants to appear before the City Court, "to answer to the city of Lexington why they should not be fined for presuming to sell by retail, without a proper and legal license so to do, any quantity of wine, brandy, whiskey, &c., on the 11th February, 1846," &c.

A warrant issued by the Clerk of the City Court "for presuming to sell by retail without a license so to do, any quantity of wine, brandy, whiskey &c." is too indefinite a charge to authorize a judgment by the City Court under the city ordinance, which makes it penal "to sell by retail less than a quart."

This hardly amounts to a charge of having actually sold, on the day named, by retail, any quantity of wine, brandy, whiskey, &c. But if susceptible of that construction, and it contains that charge, yet the charge itself, we think, is insufficient. To sell by retail *any quantity*, is too indefinite. In one statute the selling by retail, in any quantity less than a gallon, is prohibited. In another there is a provision that merchants shall not be prohibited from retailing liquors, except in a smaller quantity than one quart. So that the term *retail*, when used in reference to the selling of spirituous liquors, cannot be considered as having, as contended, a definite, technical, legal meaning as to the quantity sold. But the selling charged in the warrant, is stated to be against the ordinance of the city of Lexington. The ordinance to which we are referred, and as appears from a copy before us, prohibits the selling by retail, less than a quart. The warrant is, therefore, deemed insufficient.

The Marshals of the city of Lexington, whose fees are all contingent, depending upon the conviction of the accused, are incompetent witnesses against persons charged with violations against retailing; their interest though small is direct.

2d. The Court erred in receiving the testimony of the two city Marshals. They were both interested in the conviction of the defendant. Their fees for the service of process, the summoning of witnesses, and in a word all their fees in the case were contingent upon a judgment being rendered for the city. If the defendant or defendants were not convicted, they were entitled to no fees. It is true the interest is inconsiderable, but it is a direct interest and sufficient, we think, to render them incompetent as witnesses.

It may be important, as contended, that such officers should be witnesses. Their efforts for the detection and punishment of offenders and violators of the penal laws, may be necessary, and indeed a part of their duty; and if so, public policy requires that such provision should be

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made for their services and fees, as to remove all objection to their competency as witnesses.

WOOLDRIDGE vs LUCAS, &c.

3d. The Court erred in rendering a judgment against the defendant for twenty dollars, the price for two distinct offences, and as proved, at different periods. The warrant, if sufficient, charges but one offence.

Fines for two distinct offences of retailing, tho' proved, cannot be imposed where only one is charged.

The judgment is reversed and the cause remanded, with directions, as the warrant is deemed insufficient, to sustain the motion in arrest of judgment.

Combs & Shy for plaintiff; *Hunt* for defendant.

Wooldridge *vs* Lucas, &c.

TROVER.

ERROR TO THE RUSSELL CIRCUIT.

Forfeitures. Felons.

Case 15.

September 23.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

The plaintiff brought an action of trover for a female slave, against the defendants, and after two trials before a jury and a failure to find a verdict upon issues joined, the case was submitted to the Court upon the following agreed facts, in substance: that the plaintiff was indicted, tried, convicted, and sentenced to a confinement in the Penitentiary for two years, for felony; that he was pardoned and discharged before the expiration of his term; but before his pardon and discharge, one of his sons sold the slave in question, which before his conviction was his property, to the defendants. Upon these agreed facts the parties submitted the case to the judgment and decision of the Court, upon the following terms: that if the Court should be of opinion that the law was for the defendant, judgment was to be rendered for him, and if for the plaintiff, then the facts were to be submitted to a jury upon all the grounds of defence relied on by the defendants.

Judgment of the Circuit Court.

The Court gave judgment against the plaintiff, and he has appealed to this Court.

The 20th sec. of the 10th art. of the constitution abrogates so

The case involves the construction of the 20th section of the 10th article of the constitution of Kentucky, and of the two acts of the Legislature, the one passed in

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Wooldridge vs Lucas, &c.

much of the common law forfeiture as affects the inheritance, leaving it in force only as relates to the estate for the life of the offender.

1796, (1 *Stat. Laws*, 531,), the other passed in 1802, (2 *Stat. Laws*, 1309.) The 20th section of the constitution provides, "that no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth." This section abrogates so much of the common law forfeiture upon conviction, as affects the inheritance, leaving in force so much of the same as operates upon the estate during the life of the offender.

The provision of the statute of 1796, the 43d and 44th secs.

The 43d and 44th sections of the act of 1796, *supra*, provides that "whensoever any person shall happen to be attainted, convicted, or outlawed for any treason, misprison of treason, murder or felony whatever, there shall be, in no case, a forfeiture to the Commonwealth, of dower, of lands or personal estate, but the same shall descend and pass in like manner as by law directed in case of persons dying intestate, nor shall any attainder work a corruption of blood, any law or usage to the contrary notwithstanding. Saving to all and every other person and persons, bodies politic and corporate, their heirs, successors, and to every of them, (other than to such offender that shall be attainted, convicted or outlawed,) all such right, title, interest, entry, lease, possession, condition, profit, commodity and hereditaments, as they or any of them had, or should, or of right ought to have before or at the time of said conviction or outlawry."

If these sections stood alone and unaltered by the provisions of the statute of 1802, they might properly be construed as a surrender of the forfeiture, to which the Commonwealth was entitled during the life of the offender, to the wife and children or those who would be entitled to the estate in case of his dying intestate, and as well in cases where the punishment of the offence was a confinement for a term of years in the Penitentiary, as when the punishment was death.

By the statute of 1802, (*St. Law*, 1309,) the estate of felons is not to be forfeited, but the wife's

But the Legislature takes up the subject, in the fifth section of the act of 1802, *supra*, and provides a different mode for the disposition of the property of a convict confined for a term of years, variant from and inconsistent with the disposition of it, made by the sections quoted of

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the previous act, and must be regarded as modifying and changiug the said sections, in this class of cases. It provides that "where any person shall be sentenced to confinement in the Penitentiary for any term exceeding one year, it shall be lawful for the wife of such person to apply to a Court of chancery for *alimony*, in the manner prescribed by the act concerning alimony; and the Court to whom application is made, shall, on the production of the copy of the record of the District Court, decree *alimony*, as in other cases. The infant children of such convict, shall, for and during the time of his confinement, be regarded as orphans, and shall have guardians appointed to them by the Court of the county, and may be bound apprentices; and the whole proceedings, both with regard to them and the estate, shall be such as are directed by the act concerning guardians, infants, masters and apprentices, passed in the year 1797. During the period of the confinement of any convict in the Penitentiary, he shall be liable to be sued as if he never had been convicted, by a copy of the writ, &c., being delivered to the keeper, &c. &c., and in all other respects the same proceedings shall be had against *his estate* as against that of other persons. And every convict confined in the Penitentiary, shall have power, by his or her last will and testament in writing, to devise *his* or *her* estate, in the same manner as if he or she had never been convicted; and on his discharge therefrom, *his* estate, or so much thereof as has not been *legally disposed of, shall revert* to him again." Numerous clauses in this section show that the Legislature did not intend to deprive a convict for a term of years, of his right and title to his estate, even during his confinement in the Penitentiary, much less during his life to give it to his wife and children as in cases of intestacy; but to allow to them the use, issues and profits of the same, subject to the payment of his debts, for which latter purpose it might be sold and disposed of, by a proceeding against *him* as *his* estate. And he was authorized to *devise* it, as his estate, *in the same manner* as if he *had not been convicted.*

right to alimony, and the right of the children to support, and of creditors, is recognized; and the right of the offender after release from imprisonment, of what has not been disposed of to either of these purposes, is complete.

Alimony imports a provision for the *support* of the wife out of the *profits* of the estate of her husband, the allow-

The provision of the statute of 1802, for alimo-

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WOOLDRIDGE vs LUCAS, &c.

ny to the wife of a convicted felon, is repugnant to the idea, that upon the conviction of the husband, a right to dower became complete.

ance to be regulated according to the value of the estate. If the wife was entitled to her dower and distributable portion of the estate, as in cases of intestacy, it can scarcely be believed that the Legislature would have made the provision for her recovery of alimony, by a proceeding against the husband as in other cases. If the estate was in the husband, then there was propriety in the provision, but if an interest was in the wife as great or greater than she would be entitled to recover, then there was no necessity or propriety in the provision.

—And the provision for the appointment of guardian to the infant children of such felon, is repugnant to the conclusion that the right of the father, upon his conviction of felony, descend to the children, as if he had died intestate; and so is the provision that his estate shall revert to him upon his release.

So with respect to the minor children, guardians may be appointed for them, who are to be governed by the act of 1797, by which act they have no power to sell their estate, especially lands and slaves, but to apply the issues and profits only to their support, and if it will not suffice, to bind them out as apprentices. And the power is given to the convict in the Penitentiary, to dispose of his estate by will, in the *same manner* as if he or she had *never been convicted;* and on his discharge *his estate*, or so much thereof as has not been *legally disposed of*, shall revert to him again. If the title to the estate passed to the wife and children during the life of the convict, how could he devise it by will? He might, it is true, as decided by this Court in the case of *Rankins' heirs* vs *Randins' executors*, (6 *Monroe*, 535,) devise the remainder of the fee, after his death, but such power of devise can scarcely be regarded as a power to devise *his* or her *estate* in the *same manner* as if he or she had *never been convicted*. And how can the estate revert to the convict upon his discharge, if it was intended to pass to the wife and children during his life? These clauses are opposed to the idea that the estate and title was to pass and be vested in the wife and children, or others, as in the case of dying intestate, as directed by the sections quoted in the act of 1797, and clearly indicate an intention on the part of the Legislature, to permit all right and title in the estate, to remain with the convict, subject to the payment of his debts and the use and support of the wife and children during his confinement, and no longer.

But it is insisted that as so much of the estate only is to revert to him, as has not been *legally disposed of*, and

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as the slave in contest was disposed of before the plaintiff's pardon or discharge, that she does not revert to the plaintiff. This argument pre-supposes that the right and title to the slave were in the children, and that they had a right to sell. We have shown that no such right or title was intended by the last act to pass to them; nor is any express *power given* to them to *sell* or dispose of the property by the last act, nor can any such power be implied, but the contrary may be fairly implied. The section provides a mode by which the property of a convict may be *legally disposed of*, namely, for the payment of debts, and to that mode should the language of the statute be construed to apply, or to some other mode of legal disposition, by a regular and authorized proceeding in a Court of chancery or law. The words "legally disposed of," are fully satisfied by such an application, without extending them to embrace a disposition made by the children, which is unauthorized by the whole tenor of the section.

The judgment of the Circuit Court is, therefore, reversed, and cause remanded, that a new trial may be granted and further proceedings had.

B. & A. Monroe for plaintiff; *Harrison, Bodley & Hunt* for defendants.

Graham, &c. *vs* Moore, &c.; Levis, Cook, & Co. *vs* Same.

CHANCERY.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Attachments. Usury.

Case 16.

September 23.

JUDGE BIBB delivered the opinion of the Court.

IT seems to this Court that the complainants' bills were properly dismissed, so far as they sought to subject to the payment of their demands against Moore, the goods and claims which had been transferred by him to Kitts.

There are some facts and circumstances, it is true, in regard to the transactions between Moore and Kitts, tend-

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GRAHAM, &c. vs MOORE, &c.

ing to excite some suspicion as to their correctness; but in view of the whole case, we think the charge of fraud as against Kitts, is not established, nor is it shown that he was indebted to Moore.

A creditor of one who has paid usury, cannot recover it from the receiver without a transfer of the right from the payer or his ag't. (1 *B. Mon.* 314.)

The loan from Kitts to Moore, made in New York, was, according to the answer of Kitts, usurious, but the complainants have not sought any relief upon that ground, and even if they had, the record does not present such a case as would entitle them to it. The loan had been discharged by Moore before the complainants sued out their attachments, and according to the principle settled by this Court, in *Estill* vs *Rodes*, (1 *B. Monroe*, 314,) they could not reach the usury in the hands of Kitts, without a transfer, or without the assent of Moore. Nor do we find any thing in the statutes of New York against usury which are copied into the record, which would enable the complainants in this mode of proceeding, to reach either the principal or the usury, even if those statutes could be regarded in all respects as in force in Kentucky. Although, according to the laws of New York, the note for $4,000 from Moore to Kitts was void, yet we do not perceive, if Moore had paid off the note in New York, that he would be entitled even there to recover back any thing but the usury. The right to recover *that* back, is given first to him and his personal representatives, if asserted within a year, and if not, then to the overseers of the poor.

A note given for a usurious loan in N. York, and paid off in Kentucky, gives no right to a creditor or payer to sue in equity for the principal sum paid, tho' the note may have been void in N. York, nor to recover the usury without the assent of the payer.

The note was paid off in Kentucky, and whether by transfer of notes or by accepted drafts, is unimportant, so far as the right of reclamation is concerned. A Court of Equity would not arrest the collection by Kitts, or if goods had been transferred, compel their surrender, in any event, even at the instance of Moore, to a greater extent than the usury actually paid. For notwithstanding the note might have been void, and Kitts could not recover upon it, yet Moore in good conscience was bound to refund the money actually received; and having done so, equity would certainly not aid him in reclaiming it.

As against Kitts, therefore, the complainants were entitled to no decree.

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But Levis, Cook & Co., the complainants in one of the consolidated cases, attached a debt alledged to be due from William Essex to Moore, of *about* $87. Process appears to have been served upon Essex, but no answer was filed by him, nor is any claim asserted by Kitts, nor as we perceive, by any one, to this alledged debt due Moore.

PETTY'S HEIRS *vs* MONTAGUE.

Complainants attaching a debt alledged to be due to the debtor, and not disposed of, garnishee is entitled to a decree for the amount, but not for costs.

As the record now stands, the complainants, Levis, Cook & Co. were entitled to a decree against Essex for $87. In that respect their bill was improperly dismissed.

Upon that ground alone, therefore, the decree is reversed, and the cause remanded, that a decree may be rendered against Essex, as indicated, but without costs; and the complainants bills dismissed at their costs as to the other defendants.

And as the decree is in effect affirmed in every other respect, and as the defendant Essex does not appear to have been in fault, the appellants will be entitled to no costs in this Court.

Fry & Page for appellants; *Guthrie* for appellees.

Petty's Heirs *vs* Montague.

CHANCERY.

APPEAL FROM THE FAYETTE CIRCUIT.

Case 17.

Gifts. Specific legacies.

September 24.

JUDGE BIBB delivered the opinion of the Court.

Case stated.

RANSDALL PETTY made a deed of gift to three of his children, of his landed estate and slaves, but not to take effect till his death. He at the same time, by an additional writing attached to this deed, and which may be considered as constituting a part of it, provides for two other children as follows:

"And I also bargain, sell and convey to my daughter Elizabeth Webb, and my son Joel Petty, the sum of fifteen hundred dollars each, to be paid them at my death, first my property that is not mentioned in the assignment to my three children, William, Ann and Sarah Jane, to be sold to make up the amount, and should that be insuf-

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PETTY'S HEIRS vs MONTAGUE.

ficient, the balance to be made up of my land and negroes."

Immediately after making this deed, Petty married a second wife, to whom dower in his landed estate was decreed: *Petty* vs *Petty*, (4 *B. Monroe*, 215.)

At his death he left personal estate to the amount of near five hundred dollars, which was absorbed in payment of debts, and there being still left a balance of unpaid debts to nearly the same amount.

Decree of the Circuit Court.

Upon this state of fact the Court below was of opinion that the land and slaves were subject to the payment of the whole amount of the donation to the children, Joel and Elizabeth, and decreed accordingly.

The correctness of that opinion and decree is the only question for consideration.

A deed of gift giving specific sums to the donor's children, to be raised at his death by the sale of property not deeded away if sufficient, if not sufficient then to be raised by the sale of land and slaves, it proved insufficient. Held that the land and the slaves were subject to the payment of these sums, and that they constituted a charge upon the gift.

It is contended that the claims of Joel and Elizabeth should be diminished by the amount of the personal estate, that they should pay rateably, the debts, and bear their share of the loss arising from the claim of dower. But we are not satisfied that this position, to any extent, can be sustained. Even applying the rules and principles, which would be applicable to the case, had the deed been a will, we should still be of opinion that Joel and Elizabeth would be entitled, each, to fifteen hundred dollars, and that the land and slaves would be subject to its payment, of course after the payment of debts.

The land and slaves were given subject to this charge, and to the entire charge, should the residue of the dower estate prove unavailing. The deed did not divest him of the entire control of his personal estate. He could have little or none, as he chose. He in effect, appropriated the whole to his own use while living, in creating debts for which it was liable. The donation to Joel and Elizabeth, had the deed been a will, would have been a specific legacy, and not subject, we think, according to the authorities, to abatement or contribution: (*Williams on Executors*, 842; *Ward on Legacies*, 370.) A specific sum is given and the payment of the entire amount, we think, is made a charge upon the land and slaves upon the failure of the other estate.

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The decree is, therefore, affirmed.

Robinson & Johnson for appellants; *Bullock & Breckinridge* for appellees.

Lampton *vs* Usher's Heirs.

CHANCERY.

APPEAL FROM THE CHRISTIAN CIRCUIT.

Vendor and vendee. Infants' real estate. Jurisdiction.

Case 18.

September 24.

JUDGE BRECK delivered the opinion of the Court.

DAVID USHER died intestate in the county of Christian, leaving a widow and eight children.

Case stated.

At the May term, 1837, of the Christian Circuit Court, seven of the children, with the husbands of several of them who were *femes covert*, exhibited their bill, alledging that their ancestor left a valuable landed estate, consisting of several tracts; that what was called the homestead was large and valuable, and could not be divided without greatly impairing its value, and that it would be for the interest of all parties concerned, to sell that tract and out of the proceeds to provide for the widow, who was willing to receive an adequate compensation in money, in lieu of her dower in the real estate, which had not been allotted to her; that as some of the heirs were infants, there could be no valid allotment and division of the estate without the aid of the Chancellor. They prayed for a sale of *the homestead*, an allotment in money to the widow out of the proceeds, and an equitable division and distribution of the residue, and also of the other estate, among all the heirs, taking into consideration advancements which had been made to a part of them by their ancestor, in his life time. Two of the complainants, Baxter E. Usher and Newton B. Usher, were infants, and petitioned by their brother and next friend, James H. Usher.

The widow and James Y. Barnett and wife, the latter being one of the children of David Usher, were made defendants. The widow expressed a willingness, in her answer, to a sale of the home tract. and to receive out of

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LAMPTON vs USHER'S HEIRS.

the proceeds, during her life, three thousand dollars, in lieu of her dower in the entire landed estate of her deceased husband.

Barnett and wife also answered, consenting to the sale, and in effect uniting in the prayer of the bill.

The Court decreed a sale of the home tract and three thousand dollars of the proceeds to the widow during life, in lieu of her dower, and a distribution and division among the heirs, of the residue, and of the other estate.

Commissioners were appointed to carry the decree into effect, who, at the August term of the Court, 1839, made a very full and explicit report of their proceedings. They reported a sale of the home tract at public auction, and that James J. Lampton had become the purchaser and executed bonds for the purchase money, according to the decree. They reported, also, a deed of conveyance to him on behalf of the heirs, and a settlement and division of the whole estate, but varying somewhat from the mode directed by the decree, in virtue of a written agreement, which had been entered into by the heirs, and which was also reported. The report, settlement and partition made by the Commissioners, were by consent of parties, approved and confirmed, and at the same time made the final decree of the Court. The deed to Lampton was also duly acknowledged and certified to the County Court for record. The sale was on a credit of one, two and three years, and bond and surety given by the purchaser to the Commissioners, for the use of the widow and heirs. Lampton obtained possession of the purchased premises in the fall of 1839. He subsequently paid a portion of the purchase money and executed his note for about $2,000, to the widow, on account of the portion thereof decreed to her.

Bill of Lampton for rescission.

In 1843, judgments having been obtained against him for the residue, and also for the amount which he had assumed to the widow, he exhibited his bill against the widow and heirs and Commissioners, seeking to avoid his purchase upon the ground that the proceedings and decree, under which the sale was made, were null and void, the Court having no jurisdiction to direct it; that part of the heirs were *femes covert*, and two of them infants, one

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of whom, Newton B. Usher, was also an idiot. He insists that he obtained no title whatever by his purchase, but if he did, he tenders a release thereof. He prays that the sale may be set aside and held for naught, and the purchase money paid by him refunded, and an injunction, which was awarded him, restraining the collection of the residue. Other defects and irregularities in the proceedings by the heirs, are suggested and relied on, but which need not be here noticed.

The answer of Usher's heirs resisting the rescission, and tendering a deed confirming the conveyance by commissioners.

The heirs answer, resist the relief sought, and insist upon the validity of the sale. They deny that the defendant, Newton, is an idiot. They further rely upon a deed of confirmation made to the complainant before the exhibition of his bill, by the widow and all the heirs, except Baxter, one of the infants, who had died intestate and without issue, and whose interest had passed to the other heirs. That when this deed was made, which was in December, 1842, Newton was of age and competent to make it. They further rely and show, that when the heirs exhibited their petition for a sale, Francis Usher, one of the complainants, was the statutory guardian of Baxter, and James Y. Barnett, a defendant to the petition, of Newton B. Usher. That they both united in the prayer for a sale, and consented to the final decree confirming it. All the heirs, in their answers, again confirm the sale, and pray that it may be sustained, and tender the deed of confirmation.

Decree of the Circuit Court.

The Circuit Judge perpetuated the complainant's injunction as to $1,500, being the amount of payments made by him and for which credit had not been given, and dissolved it as to the residue, with damages; and from that decree the complainant has appealed to this Court.

In the revision of the case, we will first dispose of the objections, based upon the alledged infancy and idiocy of the defendant, Newton B. Usher.

There is some confliction in the testimony in regard to the time when he became of age, but we have had little difficulty in coming to the conclusion that he was not twenty one at the date of the deed of confirmation, as it is termed. But the testimoney is satisfactory and con-

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LAMPTON vs USHER'S HEIRS

clusive that he had attained that age when he filed his answer to Lampton's bill.

Circumstances from which capacity to consent to a judicial sale to convey, is infered by the Court.

Upon the question as to his mental capacity, we have had more difficulty. He seems, from his birth, to have been a good deal deformed in his person and deficient in his hearing. His deformity and deafness, rather than want of capacity, have had the effect, in the estimation of those who have best known him, to give him an awkward, vacant, and rather idiotic appearance. But testing his capacity by facts, which are the correct criterion, rather than appearances, we think he cannot be regarded as an idiot. It appears that he can read and write, and signed his name to the deed of confirmation, and when advised of the design of the complainant to set aside the sale, he immediately expressed his opposition. It also appears that he went into the County Court and chose his guardian, and that he is an orderly member of a christian church. These and various other facts in regard to him, indicating docility and intelligence, appear in the record, and in our opinion, furnish sufficient evidence that he was competent to consent to and confirm the sale to the complainant. Although from habit, education and difficulty in hearing, he might be deemed incompetent to transact business of importance, yet we are satisfied he had sufficient capacity and intelligence to comprehend, when explained, the nature of the controversy with the complainant, and to elect whether he would or not, sanction the sale. His alledged incapacity, in our opinion, constituted no ground for vacating, nor obstacle to the confirmation of the sale, if irregular and defective.

Where there was no objection by a vendee to the title of the vendors, no allegation of fraud in the sale, possession received and enjoyed by the vendee up to the filing of his bill to rescind, and ability is shown to make a good title at the filing of the vendor's answer,

But it is contended that the sale was not only irregular, but void, and not susceptible of confirmation. In the examination of this question, it may be premised, that there is neither allegation nor proof of any defect in the title of the heirs to all the land purchased by the complainant, nor is it pretended that there was any misrepresentation, or concealment or fraud practised by them in any way, in regard to the sale. The sale on all sides was unquestionably a fair one, and the purchase by Lampton made in good faith. The object of the proceeding by the heirs, was to effect a speedy and equitable settlement

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and division of the entire estate of their ancestor, and by means of a decree to carry out an agreed arrangement between all the parties interested.

No objection to the title appears to have been made by the complainant till near four years after he purchased and obtained the possession, when he was pressed for the purchase money, and the land had declined in value.

and a desire to confirm the sale and make good the title, the Court refused to rescind, though the purchase was made under a decretal sale which was irregular and erroneous under the statutes authorizing sales of infants real estate.

Apart from the mere naked question of title, there is no ground whatever for setting aside the sale; and as the heirs have manifested every disposition to perfect the title, if defective, and which they unquestionably had the ability to do when they filed their answers in this case, it is very clear, we think, the sale should be sustained, unless void and not susceptible of confirmation.

That the proceedings and decree, under which the sale was made, were irregular and erroneous, in view of any statutory provision authorizing a decretal sale of the real estate of heirs, is obvious. The act of 1796, only authorizes a sale when the interest of each heir does not exceed thirty pounds. Such is not alledged in this case to be the fact, and the sale shows the interest of each heir to exceed ten times that sum.

The act of 1813 authorizes a sale, upon the petition of the guardian, of the real estate of infants, the title to which is derived by descent, and where the estate is held jointly with other heirs, it authorizes, by their consent, a sale of the entire estate. It is also provided by that act, that affidavit shall be made by the guardian to the petition, that the Court shall appoint commissioners to ascertain and report the value of the estate of the infant or infants, and before a sale shall be decreed, that bond shall be executed by the guardian.

In this case the estate was held by descent, and part of the heirs were infants; but the petition for a sale was not by their guardian, certainly not directly, but by *prochien ami;* there was no affidavit to the petition, nor commissioners appointed, and no bond executed as required by the act. As we have seen, however, the infants had at the time statutory guardians, who were parties to the proceeding, and who united in the petition for a sale, al-

Though a petition for a sale of infants real estate held by descent be by a *prochien ami*, without affidavit to the petition, and without any commr's. or appraisement, and without the execution of the

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LAMPTON vs USHER'S HEIRS.

bond specified in the statute, yet if the statutory guardian be a party to the suit, unites in the petition for sale, the court has jurisdiction to decree a sale of the sale, (9 *Dana*, 526; 3 *B. Mon.* 167,) and these irregularities present no obstacle to a confirmation of the sale by the heir when of full age, and the sale within the power of the Court.

though the fact of their being guardians does not appear in the record of the petition case.

The question arises, whether, in view of this state of fact, the Court had jurisdiction to decree a sale of the land. That the Court had jurisdiction, so far as the bill sought a settlement and division of the estate, there can be no doubt. But having jurisdiction of the case for that purpose, would, we apprehend, confer no authority upon the Court to direct a sale of the land, nor in fact any validity whatever to such sale. If the Court would have had no jurisdiction without a prayer for the settlement and division of the estate, it would have had no more with it. Are the proceedings void then under the statute? It has been decided by this Court, that the failure of the guardian to make the affidavit to the petition, and to execute bond before the sale, would not be fatal to the jurisdiction, and render the sale void, nor would the omission of the Court to appoint commissioners to ascertain and report the value of the infant's estate.

In *McKee's heirs* vs *Hann, &c.*, (9 *Dana*, 526,) no bond was executed before the sale, yet the sale was sustained. The Court, in effect, decide that the execution of the bond was not essential to give the Court jurisdiction. That the sale would be valid provided a bond was subsequently executed. In the same case it was held that the report of commissioners appointed to ascertain the value of the infant's estate, not being in strict conformity to the act, would not affect the sale.

In *Gates* vs *Kennedy*, (3 *B. Monroe*, 167,) the Court not only recognise the principles settled in *McKee's heirs* vs *Hann, &c.*, in regard to the failure to execute bond, and the defect in the order appointing commissioners, and in their report, but the Court in that case go further, and decide that the want of an affidavit constituted no obstacle to the confirmation of the sale by the heir after he had become of age, and while the sale was incomplete and within the power of the Court. This case virtually decides the affidavit not essential to give the Court jurisdiction.

But in *Vowles' heirs* vs *Buckman*, (6 *Dana*, 466,) and which is relied upon by the counsel for the appellant as

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conclusive upon the question of jurisdiction, the infants petitioned, as in this case, by their next friend, and there was no affidavit nor bond, as required by the statute. The Court decided that the sale was unauthorized and void, and consequently that no title passed to the purchaser. But the Court say in that case, that "there was no such petition or affidavit by the guardian, as required by the statute, nor any act on his part, equivalent to an application by him, or evincing even his concurrence in the application." Nor did it appear that the infants had any guardian at the time of exhibiting their petition.

In the case under consideration, the infants had duly appointed statutory guardians, and as we have seen, both united in the petition for a sale, although not expressly in their character as guardians.

When infants petition by *prochien ami*, for the sale of real estate, and make the statutory guardian of others defendants, and they unite in the prayer for a sale, they will be considered as acting as guardians, and as petitioning for it, and the fact of guard'ship may be shown by proof *dehors* the record.

So far as the petition or bill sought a settlement and partition of the estate, the infants might sue, as they did, by their next friend. As to the sale of the land, we think in a Court of Equity, in view of all the facts, the guardians should be regarded not only as assenting as guardians, to the sale, but as petitioning for it, although the record in the suit of the heirs furnished no evidence that Francis Usher and Barnett, were the guardians of the infants, yet that fact, we apprehend, may be established as it is, by proof *dehors* the record.

In the case of *Singleton* vs *Coger*, (7 *Dana*, 479,) the purchaser was permitted to show, and thereby sustain the sale, that the land was held by descent by the infant, a fact not appearing in the record of the petition and sale, and which on that account had been reversed by the heir. Suppose the next friend of the infants in the petition of Usher's heirs, a case put by the Court in *Singleton* vs *Coger*, had been in point of fact their guardian, it would clearly have been competent for the purchaser or the infants to prove it, and when proved, the effect would be the same as if the record had shown it.

But this case differs from *Vowles' heirs and Buckman*, in another important particular. In this case, the sale was made on the 8th of August, and on the 19th of the same month the commissioners made their report, and as

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LAMPTON vs USHER'S HEIRS.

part thereof, they reported a deed to the purchaser, dated on the day of sale. The report at the same term of the Court, and while the sale was incomplete, and within the control of the Court, was by consent of all parties, infants as well as adults, confirmed. There appears to have been no such consent or confirmation in *Vowles' heirs and Buckman.*

We can hardly doubt that such an express recognition of the sale and conveyance to the purchaser, at least by the adult heirs, and who were not *femes covert*, would be binding upon them; and as the deed contained a clause of general warranty, if the title proved defective, that they would have a right, in support of their covenant, to cure the defect. It is true the complainant alledges that he did not accept the Commissioners deed, but it does not appear, nor does he alledge, that he made any objection to it, till he exhibited his bill, nor does he pretend ignorance of its existence from the day of its date. He ratified his purchase and virtually accepted the deed by, shortly after its date, acknowledgment and confirmation, taking possession of the land, and which, without complaint or objection, he continued to cultivate, improve and enjoy, till the commencement of this suit. In further confirmation of his purchase, he paid, from time to time, portions of the purchase money, and voluntarily assumed to pay the widow, on account of her dower, a large sum, for which he obtained credit upon his bonds to the Commissioners.

Again; *Vowles' heirs* vs *Buckman* was an ejectment by the heirs against the purchaser, and the naked legal question of title was presented, and decided alone upon the record of the petition and proceedings by the heirs, which showed that the sale was made upon the petition of infant heirs, by their next friend, without the assent or even existance of a guardian.

A purchaser at a sale of infants real estate made under a decretal sale, to whom a conveyance was made and reported to Court, and

In this case the *purchaser* appeals to the Chancellor to be relieved from his purchase, upon the ground that he acquired thereby, if any, but a defective title. But he evinces no disposition to carry out the contract, manifestly made in good faith, even if his title can be made perfect, as it was intended and supposed to be, and as the

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heirs are now desirous, and undoubtedly able to render it. In the former case, if it were a doubtful question whether the purchaser had obtained the title of the infants, the Court would not be inclined to sustain it. But in this case, as the purchaser is already, and has been for years, in the undisturbed possession of the land, and the heirs are desirous and able to clear his title of doubt and render it perfect, the Chancellor might well refuse, upon a doubtful question as to the character of the sale, whether void or voidable, to vacate it. We cannot, therefore, regard *Vowles' heirs* vs *Buckman* as conclusive of the case under consideration, but upon the whole, we are of opinion the complainant has failed to manifest his right to be relieved from his purchase. The sale, we think, ought to be sustained:

the sale and deed received and confirmed, *by consent*, and who took possession under the purchase and held and improved the estate and paid part of the price, will be regarded as having accepted the deed.

1st. Upon the ground that the guardians of the infants were, in point of fact, parties to the petition and proceedings under which the sale was made, and may properly be regarded as such, not only as assenting, but as applicants for it. If correct in this position, the sale, although irregular and erroneous, was not void but voidable, and, therefore, susceptible of confirmation.

2d. We are inclined to regard the recognition of the sale and conveyance to the complainant, and the consent to the final confirmation thereof by the decree, as binding, at least upon all the parties except the infants and *femes covert*, and the subsequent acts of the complainant as equivalent to a ratification of his purchase and acceptance of the deed; and although the title of the infants and female heirs, in this view of the case, may not have passed by the deed, yet as it contained a covenant of warranty, binding upon the other parties, they would have a right to procure the defect in the title as to the residue of the parties to be cured. This was done by the subsequent deed, which was sufficient to pass the entire title, except as to the defendant, Newton, who was, in our construction of the testimony, at the time an infant. That deed is not noticed by the complainant, but it appears to have been lodged in the office of the County Court Clerk and recorded, and the defendants aver, in their an-

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ARNOLD vs FOOT, &c.

swer, that the complainant was duly notified thereof, but of this there is no proof.

In order to vest a perfect title in complainant, however, the confirmation of this deed by the defendant, Newton, after he became of age, which was not till after the exhibition of complainant's bill, was necessary. He, with all the other parties, by their answer, confirm the sale, and also this deed which they exhibit and tender to the complainant.

In regard to the 88 acres of timbered land, sold as appurtenant to the home tract, we think it was properly considered as part thereof, and that the title thereto, as well as to the residue, vests in the complainant.

Where a bill is filed by vendee to perfect his title under his purchase, before the title is made or tendered, and an injunction to restrain the collection of the purchase money, and the title is made complete before the hearing, the dissolution of the injunction should be *without* damages.

Finally, we perceive no error in the decree, except in awarding damages upon so much of the judgments enjoined, as to which the injunction was dissolved, and in that respect it is erroneous. The complainant had a right to have the sale confirmed and his title perfected before required to pay the purchase money.

Wherefore, for the error indicated, the decree is reversed and the cause remanded for further decree in conformity herewith.

Morehead & Reed and Gates & Lindsey for appellant; *B. & A. Monroe and Harlan & Craddock* for appellees.

CHANCERY.

Arnold *vs* Foot, Bowler, &c.

ERROR TO THE KENTON CIRCUIT.

Case 19.

Mortgages. Liens. Rents.

September 25. JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

IN June, 1834, Price and Montague executed a deed of mortgage, professing to convey to Arnold lots Nos. 75 and 76 in the town (now city,) of Covington, to secure him against loss on account of his liability for certain enumerated debts of Price, for which Arnold was either security or accommodation endorser. Among these debts was a note of Price, endorsed by Arnold, to Foot and Bowler for $200. Montague does not appear to have

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been originally a party to any of these debts, but he acknowledges in the mortgage that he is equally bound with Price for their payment. And it appears that Price had, before that time, made some conveyance to him of lot 75, or of both lots, based upon the consideration, as it is said, of his assuming to pay certain debts of Price. But as this conveyance is not exhibited nor the particulars of it either proved or stated, nor the debts assumed by Montague designated, nor any assumpsit by him shown, except that contained in this mortgage, we shall assume from this and other facts appearing in the case, that as against Foot and Bowler, who as creditors of Price are seeking their remedy against his equity of redemption in the mortgaged property, the deed to Montague presents no obstacle, and that it was, as is alledged, fraudulent and void; and at any rate that Montague has no interest except in a fair disposition of the mortgaged property. It appears that at the date of the mortgage, Foot and Bowler held a second note of $257, executed by Price to one Fisher, and assigned by Fisher to them, and that both notes were, in fact, executed for the benefit of Fisher, for whom Price was under other liabilities, as was Arnold also. In October, 1834, judgments were obtained on each of these notes, and executions thereon were returned "no property found." But a subsequent execution on the judgment for $200, was levied on the equity of redemption under the mortgage above stated, which was sold and Foot and Bowler became the purchasers.

It further appears that for the lot No. 76, Price held only a bond for title, upon A. Gano; that prior to the date of the mortgage, he had exchanged a part of that lot, fronting forty one feet and running back its whole length, in part payment for other property obtained from Fisher, but retained Gano's bond as an indemnity against certain liabilities for Fisher, executing to him his bond for conveying the forty one feet, and also for the payment of $333, due from him to Fisher, when the latter should release him from responsibility for three debts mentioned, viz: one of $500 to McClure, $333 to Barr and $200 to Bowler, understood to be the same as the note to Foot and Bowler, mentioned in the mortgage.

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ARNOLD vs FOOT, &c.

Gano's bond seems to have been assigned by Price to Montague, in April, 1834, and by Montague to Arnold in July, 1834. In 1837, Fisher assigned Price's bond to Arnold, and in 1840, Arnold obtained a deed from Gano for the entire lot No. 76.

In January, 1839, Price and Montague conveyed to one Foley, all their interest in a portion of lot No. 75, fronting 47 feet and running back 95 feet, for the alledged consideration of $450, of which it appears from the testimony, that $150 were paid in hand and the residue was to be paid to Foot and Bowler; and it would seem that under this arrangement, the judgment for $200, with interest, &c., has been paid by Foley. But this fact is not alledged in the pleadings. It is also stated by Foley, in his deposition, that in the same year that he made this purchase, he sold and conveyed to Foot and Bowler all the interest he had acquired from Price and Montague. And it may perhaps, be inferred, that in this way he paid them what he had undertaken to pay, and that he acted as their agent in making the purchase. These facts, however, except the fact of Foley's purchase, are not alledged.

In April, 1839, Foot and Bowler filed their bill against Price, Montague, Fisher, Arnold and Foley, alledging fraud in the conveyance from Price to Montague, setting up their judgments, executions, and the returns, relying upon their own purchase of the equity of redemption before the transfer to Foley, claiming the right to redeem from Arnold, and requiring an account of the mortgage debts paid by him, and also of rents received from the premises. They also claim that their debt of $257 against Price, and endorsed by Fisher, was secured by the arrangement between Price and Fisher, and has a lien on the 41 feet of lot No. 76, and pray for general relief.

Arnold makes his answer a cross bill, in which he alledges, that shortly after the date of the mortgage he discovered the condition of the title to lot No. 76, and that the mortgage gave him no lien upon 41 feet of it, which had been sold to Fisher; that by arrangement entirely distinct from the mortgage, he acquired the right of Fisher,

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by paying the McClure debt, amounting with interest, to over $600, and got the bond of Gano from Montague, and thus obtained the title. He claims to hold the 41 feet as his own, free from the mortgage, and without responsibility for rents. He states his payment of all the debts mentioned in the mortgage, except the $200 to the complainants, and claims as a credit upon the amount of rents received from the lot No. 76, expenditures made in payment of taxes, and paving dues, and in redeeming the lot, which had been sold therefor. He and the other defendants deny that the note for $257 was secured by the arrangement or bond between Price and Fisher, and also deny the validity of the purchase of the equity of redemption by the complainants under their execution for one of the mortgage debts.

Decree of the Circuit Court, and Arnold's objections thereto.

The Court directed an account to be taken of payments made by Arnold upon the mortgage debts, and also of rents received by him from both lots, and for the balance in his favor on the account thus taken, without allowing him credits for repairs, taxes, &c., a sale of both lots was decreed without discrimination. From this decree Arnold has appealed, and claims not only that he should have been allowed his expenditures, made for the benefit of the mortgaged premises, but also that he should have been regarded as the absolute owner of 41 feet of lot 76, without accountability for the rents thereof, and that that portion of the lot should not have been sold, or that at any rate, if it is to be held subject to the mortgage, he is entitled to be reimbursed for the payment by which it was relived from the claim of Fisher upon it, including not only the McClure debt with interest, but also a debt of $400 paid to Powell, in which he was the surety of Fisher.

A mort'gee who is charged with rents upon the mortgaged property, should be allowed for expenditures made for the relief of the mortgaged property in the extinguishment of paramount liens.

We are satisfied that the Court erred in not allowing the expenditures of Arnold on account of lot 76, as a credit upon the rents. The propriety of this claim is too obvious to need further remark.

We are also satisfied, that before the 41 feet of lot 76 can be regarded as fully subject to the mortgage, Arnold must be paid the McClure debt, with interest; and it is not entirely clear that he should not also be reimbursed

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ARNOLD vs FOOT, &c.

for the payment to Powell, with interest. It clearly appears that the McClure debt was paid by Arnold, for the sole purpose of acquiring Fisher's right; and although the Powell debt had been paid by him before, and under compulsion, it may be that Fisher being insolvent, his interest in this lot was looked to as furnishing some indemnity for that payment, and that it was in part on that account that Arnold procured the assignment from Fisher. This last claim, however, is not set up in the pleadings, nor is it averred by Arnold to have constituted a part of the consideration of Fisher's assignment. We should therefore regard it as improvident to direct peremptorily that this payment should be taken into the account without further investigation, even if the lot 76 is to be brought fully into the mortgage.

A. mortgages lots 75 and 76, never having had the legal title to lot 75, and having before the mortgage exchanged 41 feet of it with B. for whom he was liable as surety, &c. and retaining the title bond, but giving his own bond to convey to B. when he should be reliv'd from certain of these liabilities. The mortgagee may, by fair arrangement with B. acquire the 41 feet, subject only to the indemnity reserved in the bond of A. to B. This interest of A. is all that his attaching creditors can reach in the 41 feet.

But we are of opinion, under all the circumstances of the case, that Arnold's purchase of Fisher's interest did not enure to the benefit of the mortgage, except so far as the same debts were secured in the mortgage, and also by the lien of Price on Fisher's interest in lot 76; that for the debt of $200 to Foot and Bowler, which is mentioned in both instruments, and for which Price was liable, the 41 feet remained bound in Arnold's hands; that the McClure debt being paid, and Price being indebted to Fisher in precisely the amount of his liability to Barr for Fisher, viz: $333, this debt in his own hands furnished all the indemnity he was entitled to, or could ask for that liability; that moreover, his lien for the $200 due to Foot and Bowler, was the only interest which he could subject to any of the mortgage debts, and as his other liens were in effect discharged by the payment of the McClure debt, and by his own indebtedness equal to his liability for the Barr debt, the fair presumption is, that he gave up the bond on Gano on the sole condition that he was to be indemnified out of this lot for his liability on the $200 note to Foot and Bowler.

It is true, Price in his deposition states that Arnold verbally promised as the condition on which the title of Gano was allowed to be made to him, that he would pay the debt of $257 to the complainants, and also another debt not mentioned in the bond to Fisher. But this

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statement is inconsistent with the import of the writings, and with the very nature of the case. Fisher or his assignee, Arnold, was by the terms of the bond, entitled to a conveyance, upon paying or procuring a release of the enumerated debts; and Price had no equity to hold the lot or the title, when the debts were reduced down to an equality, with his own indebtedness to Fisher or his assignee. At any rate, there was no apparent motive, and none is assigned, for Arnold's undertaking to pay for the lot more than Fisher was bound to pay for it. And on the other hand, there is no reason to suppose that Price would give up a lien on Fisher's property, for the $200 for which he was bound for Fisher, and leave his own property exclusively subject to it.

As Fisher was in possession of the 41 feet of lot 76, Arnold cannot be regarded as an innocent purchaser, either by his mortgage or by the assignment of Gano's bond for title, which, as Price says, was made to perfect the mortgage. The assignment bears date shortly after the date of the mortgage, and long before the assignment of Price's bond to Fisher, and before the payment of the McClure debt. The assignment to Arnold of the bond on Gano, aided the mortgage in respect to the 41 feet, only so far as Price could have subjected that part of the lot No. 76 to the debts mentioned in the mortgage, that is, only so far as there was a lien for the $200. If Arnold had then acquired the legal title by virtue of the bond upon Gano, for which he gave nothing, he would have held it in trust for Fisher, to be conveyed upon his releasing Price from responsibility for the enumerated debts, and subject to Price's claim to indemnity; and his own claim under the mortgage, except for the $200 debt, would not have been enforcible on the 41 feet of said lot. His subsequent acquisition of Fisher's bond on Price, although it freed the 41 feet from all other liens, left it subject, as we have seen, to the lien for the $200 debt mentioned in the mortgage as due to Foot and Bowler, at least so far as to indemnify Price against that debt.

That debt was not paid by the purchase of the equity of redemption under the execution, because if there were no other reason, being secured by the mortgage the pur-

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ARNOLD vs FOOT, &c.

chase was invalid. But if it had been, or if it has been paid by Foley in payment of his purchase of the equity of redemption which belonged to Price, it was a payment by Price which entitled him to look for indemnity and re-payment, to the 41 feet of lot No. 76, and so it would be if it were paid by a sale of the other mortgaged property. This right Foot and Bowler may reach in consequence of their returns of no property, on the executions against Price, and appropriate to the payment of either of their debts which remain unpaid. And for the residue, they may subject whatsoever remains of the two lots, (exclusive of the 41 feet of lot No. 76,) after the balance due upon the mortgage is satisfied, so far as Price or Price and Montague had not disposed of the equity of redemption to Foley before this suit was brought.

The result of these views is, that Arnold should be regarded as holding the 41 feet of lot No. 76, as his own property, subject only to the charge of paying the amount of the $200 judgment of Foot and Bowler against Price, with the interest on the note to them for that sum; and if so much remain unpaid to the complainants, they are entitled to have the 41 feet sold to raise it; and the sum thus raised, together with such sum as they may have received from Foley in virtue of his *assumpsit* to pay them in his purchase of the interest of Montague and Price, will be credited on their two demands set up in the bill; for the residue, if any, they must look to the remaining equity of redemption in Price or in Price and Montague.

In taking the account under the mortgage, Arnold is to be credited by all payments made on the debts therein mentioned, with interest, except the debt for $200 to the complainants, and to be charged with all rents received by him from the mortgaged premises, exclusive of the 41 feet of lot 76, after deducting his expenditures as above referred to; and for the balance appearing to be due to him on the account thus stated, he should have a decree for the sale of the mortgaged premises, exclusive of the 41 feet of lot 76, or so much as may be necessary, unless by a given day, the same should be otherwise paid.

It will be seen from the foregoing positions, that we regard the bond from Price to Fisher as subject to a fair

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arrangement between the parties, and that by the arrangement made, all equities upon the 41 feet, except those reserved in the transaction, were merged; whence it follows that Barr was not a necessary party.

Wherefore, the decree is reversed and the cause remanded for further proceedings, and decree in conformity with this opinion.

Goodloe for plaintiff; *Harlan & Craddock* for defendants.

Craig *vs* Trustees of the Baptist Education Society.

CHANCERY.

ERROR TO THE CARROLL CIRCUIT.

Case 20.

Parol proof. Consideration.

CHIEF JUSTICE EWING delivered the opinion of the Court.

September 26.

Case stated.

CRAIG filed his bill enjoining a judgment recovered against him by the Trustees aforesaid, upon the alledged ground, that the note had been executed upon the promise or representation of the agent of the Trustees, that the sum promised to be paid, together with other sums subscribed by others, to the amount of $80,000, was intended to be set apart as a fund, in aid of the Pawling donation, and the interest only to be applied to the education of Baptist Ministers and students for the Ministry in Theology, and that the Trustees were applying other funds, raised with the like object, principal and interest, to rearing up the College at Georgetown, and intended to apply the amount promised by the complainant, to the same object. He prayed, therefore, a perpetual injunction against the judgment at law. The Trustees deny the material allegations of the bill as to the representations of their agent, as well as to the inducements, motives and purposes of the subscription, and charge that indigent Baptist ministers and students for the Ministry, were received and educated gratuitously, in all the departments of said College, literary as well as Theological, whenever and so many as are sent by the Churches of Kentucky to

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CRAIG vs BAPTIST EDUCATION SOCIETY.

said Institution, and that some of the funds, and the proceeds raised by their agent, that have been collected, have been applied to the general purposes of the College. Upon the hearing, the injunction was dissolved and complainant's bill dismissed, and he has appealed to this Court.

When a note is for the payment of money, absolute and unconditional upon its face, in aid of an institution of learning, can parol proof be admitted to show that the money was to have been specially applied to one branch of learning to the exclusion of others?—QUERE.

1st. The note is absolute and unconditional on its face, and it may be well doubted whether any promise or representation, as to the intended special application of the fund could be sustained by parol proof. To allow such proof would seem to allow conditions and terms to be added to the written absolute promise, by an inferior grade of evidence. The absolute promise imports an undertaking on the part of the promisor, to pay without stipulations or conditions as to the application of the fund promised, and implies a general power in the Trustees, to use the fund at their discretion, to the general purposes of the Institution, and it is certainly questionable whether parol proof is at all admissible, to give to the fund a special and limited application, not specified in the writing.

—Parol proof *dehors* the writing in such case, cannot be admitted to show the moving consideration for its execution, when the objects and considerations are various, and none are expressed in the writing.

2d. But if such proof be competent, it shows that other inducements to the subscription were held out by the agent, than those alledged in the bill, namely, the prosperous condition of the College, the necessity of sustaining it by the Baptist denomination, and that the object of the subscription was to *endow* the College. Whether the single inducement suggested in the bill prompted the subscription, or all of those held out by the agent, cannot be known. No doubt all of them had their weight, and we cannot undertake to say whether he was influenced most by one or the other, or whether he would not have subscribed to endow the College as necessary in the accomplishment of the objects contemplated by Pawling, the original founder.

3d. The complainant has certainly no right, upon the allegations of his bill, perpetually to enjoin the payment of the sum promised. To allow him to do so, would be to allow him to *defeat* his own alledged purpose and object for subscribing, to add to and aid in the objects of the Pawling donation. If he had a right to give direction to the application of the amount subscribed by him, he

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could only do so by a bill framed with a view to that object, which is not done in this case, and he has surely no right to refuse payment altogether.

The decree of the Circuit Court is affirmed.

Cates & Lindsey for plaintiff; *Hawkins* for defendant.

Roberts *vs* Walker & Embry.

CHANCERY.

ERROR TO THE CLAY CIRCUIT.

Case 21.

Attachment. Jurisdiction.

September 26.

JUDGE MARSHALL delivered the opinion of the Court.

To give the chancellor jurisdiction to attach and apply the fund of an absent debtor, in the hands of a third person, to the payment of the debts of such absent debtor, the proceedings should be instituted in the county where such third person resides at its filing or the process served in the county where the suit is brought.

THE prayer for an attachment and the jurisdiction of the Court, are founded upon the allegation that James Roberts, the debtor of the complainants, is out of the State, and has been absent during one term of the Circuit Court of Clay county, in which county he had usually resided, and that Jos. Roberts has funds of his, more than equal to the debt. The bill does not alledge that Joseph Roberts, the guarnishee, is a resident of Clay county, and there is no sufficient evidence that he was so at the commencement of the suit, or when the first process issued. The service of process upon him in Estill county did not give the Court jurisdiction to pronounce a decree, and did not, for want of that jurisdiction, attach the funds or effects in his hands, if any; and if he had not answered, no decree could have been pronounced, because neither he nor the fund would have been in the power of the Court. If the demand set up against James Roberts had been equitable in its nature, the service of process on him in Clay county, might have authorized a decree against both, on the service of process upon Joseph Roberts in Estill county. But the demand was legal and the resort to a Court of equity justified only by the alledged absence of the principal debtor, so that the ordinary process could not be served upon him, and by his having funds or effects within the reach of the Court. His subsequent return and the subsequent service of the

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ROBERTS vs WALKER & EMBRY.

subpœna upon him in the county of Clay, did not confer jurisdiction on that Court, so as to authorize it to send its process to another county, against the guarnishee. It is its power over the subject sought to be reached by the bill, which gives the Court jurisdiction.

It is the power of the Court over the subject sought to be reached, that gives the Court jurisdiction on bills for attachments—not the service of process on the principal debtor, nor the service of process in a different county from that in which the suit is brought.

It did not acquire this power by the service of process on the principal debtor, nor by the service of process on the guarnishee in another county; and as the bill does not alledge that the guarnishee resided in the county of Clay, or was there at the time, and as the process was not in fact served upon him in that county, he might no doubt have pleaded or demurred to the jurisdiction of the Court, and it is a serious question whether his answer, without making that objection, should be regarded as sufficient to confer jurisdiction. But waiving this question, we are satisfied that until his answer was filed, there was no attachment operative upon Joseph Roberts; and as the answer, after admitting that the defendant had once had in his hands funds of the principal debtor, and after showing a disposition of the whole of them, denies positively, that he had any funds or effects of James Roberts, of any description; this should be taken as a sufficient and positive denial of the charge in the bill, unless from the affirmative statements by which the denial is introduced, it appears that the alledged disposition of the fund was improper. These affirmative statements are not matters in avoidance of any fact which would have entitled the complainants to a decree, nor do they in any manner detract from the force of the denial which follows, unless they show that the denial is untrue, in law or fact, or that although literally true, it is made so by facts which show that the respondent is still liable for the funds of which he has disposed.

Where an attach't in chancery is brought in the wrong jurisdiction, it is ineffectual to bind a fund in the hands of a guarnishee, until he answer, and thereby waive the question of

It is true, if the bill had been unanswered, and if it could have been taken for confessed, the failure to answer would have been an unqualified admission of funds in hand at the service of the subpœna. But this answer contains an unqualified denial of funds, which being in the present tense, refers in strictness, to the time of answering. But as has been already said, that was the time when the attachment took effect, and if in good faith he

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had no funds at that time, it is sufficient. It would, however, require but little liberality to refer the denial to the time of the service of the subpœna, since the answer was filed in the Clay Circuit Court within four or five days after the service of the subpœna in Estill. This promptness tends to show that the defendant supposed the service of the process to have been effectual, and repels all suspicion that he was attempting to evade its efficacy, and tends to confirm his statements, which in itself goes to show that he had disposed of the fund before the service of process on him.

jurisdiction or fail to answer at all.

We might, therefore, well understand the denial as referring to the date of the service of process. But for the reason already given, this construction is not necessary. And although the affirmative statements as to the disposition of the fund may not have been as specific as was proper, and especially in referring to previous attachments, without designating the parties or the authority under which the attachments issued and were decided, yet as there was no exception to the answer, and as there is a positive allegation of compulsory payment under the attachments, we are of opinion that this defect in the form of the statement does not diminish its effect. There being then no charge of fraud in the bill, and no suspicion of it raised by the answer, and the defendant having positively denied having any funds in hand, at the time when the attachment and the power of the Court took effect, we are of opinion that upon the bill and answer, there being no testimony in the case, the complainants were not entitled to the relief sought against Joseph Roberts.

Wherefore, the decree is reversed and the cause remanded, with directions to dismiss the bill.

McKee and Ensworth for plaintiff; *Caperton* for defendants.

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PRESENTMENT.

Dewey *vs* Commonwealth.

ERROR TO THE FLEMING CIRCUIT.

Case 22. *Presentments. Remission of fines, &c. Costs.*

September 26. JUDGE MARSHALL delivered the opinion af the Court.

Case stated.

AFTER a fine of $60, adjudged against Dewey, under a presentment for keeping a tippling house, had been remitted by the Governor, and the instrument of remission filed in the office of the Court, and after Dewey had paid the costs of the prosecution, as taxed by the Clerk, the Court, on motion of the Attorney for the Commonwealth, who had acted in the prosecution, directed the Clerk to correct the taxation of costs by adding thereto $30 as the Attorney's fee, &c. Which having been done, and an execution having issued for this additional sum as a part of the costs, Dewey seeks a reversal of the order by which it was authorized.

The defendant on presentment, was fined $60 for keeping a tippling house, the Governor remitted the fine, Attorney for the Commonwealth claiming half the fine as his fee in the case, moved the Circuit Court to dirrct the Clerk to correct the taxation of costs, and tax $30 as his fee in the case. Held that the order of the Circuit Ct. was erroneous; that if the remission of the judgment by the Governor did not extend to the $30 that it was collectable under the judgment, and not as costs in the case, if it

Upon comparison of the act of 1840, (3 *Stat. Laws*, 250,) with the 6th and 7th sections of the act of 1831, (2 *St. Laws*, 1382,) the fair deduction seems to be that the Legislature intended by the former act, to give to the Attorney for the Commonwealth the same compensation for conducting prosecutions for keeping tippling houses, and for other offences mentioned in the two sections of the act of 1831, as is given by the latter act to the County Attorney and others "sueing for the same," that is "*one half of the amount recovered.*" But assuming this construction, a question arises upon the face of the statutes, whether it was intended to vest in the Attorneys and others referred to, an absolute right to one half of the judgment, or whether the *amount recovered* means the amount received from the judgment, leaving the right subject to all those circumstances which might intervene to prevent the enforcement of the judgment. It is doubtful whether the former construction would accomplish as certainly as the latter, the object of the Legislature, in giving this increased compensation, which was to insure the sup-

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pression of the mischief, by giving additional incentives for the enforcement of the penalty. Besides, if the Attorney is absolutely entitled to one half of the amount of the judgment, and not merely to one half of the amount collected, what would be the rights of the parties, if one half of the judgment should be collected, and the defendant should be utterly unable to pay the residue? Then again, is it clear that the Legislature, in promising to the Attorney, &c. one half of the *amount recovered*, intended to affect in the slightest degree the right of full pardon, which is vested by the constitution in the Executive, or to give to the Attorney any right to question the operation or extent of this privilege of pardon, which is given without condition or restriction to the Executive, not for his benefit, but for the benefit of the citizen, and for the sake of justice, which may not in all cases be attained under the forms of legal proceedings?

did the Attorney must look to the Commonwealth.

This Court has said in the case of *Rout* vs *Femester*, (7 *J. J. Marshall*, 132,) that the power of the Executive "to remit fines and forfeitures is unlimited, illimitable and uncontrolable." It is sufficient, in the present case, to say, that even if the Legislature had in unequivocal terms vested in the Attorney, &c. one half of the judgment as soon as obtained, there would still be a question whether it was intended to interfere with the power of remission in the Executive. And even if this intention were clearly evinced, a question would still arise, as to the effect of the legislative enactment to limit the constitutional power of remission in the Executive.

We do not, however, deem it necessary to determine these serious questions in the present case. For although the order complained of was probably made under the idea, that by law the Attorney for the Commonwealth was entitled to one half of the sum adjudged against the defendant, and that the remission of the entire penalty by the Governor did not defeat this right; and although it is clear that the claim of the Attorney, as founded on the judgment, is entirely inconsistent with the right claimed and exercised by the Governor to remit the entire penalty, yet we deem it equally clear, that even if in consequence of the legislative acts referred to the remission by

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TAYLOR vs FLETCHER.

the Governor, was effectual as to one half of the penalty only, and the right of the Attorney to the other half remained as if there was no remission, the proper consequence would be, that the judgment as to one half of the penalty remained in full force for the benefit of the Attorney, and his right should be enforced by execution on the judgment. And if on the other hand, the remission is effectual as to the entire penalty, the Court had no power to adjudge against the defendant an additional and new penalty in the form of an Attorney's fee. The compensation of one half of the amount recovered, allowed to the Attorney, is allowed out of the penalty, and not as a charge against the defendant in addition to the penalty. It is a part of the principal judgment, and not a part of the costs. If the defendant is not freed from the judgment, the compensation of the Attorney is enforcible under it. If he is freed from the judgment for the penalty, and the Attorney is still entitled to his compensation of one half of the amount received, he must look to the Commonwealth for it, and not to the judgment. In no view of the law or the constitution, can one half of the penalty be made a part of the costs.

Wherefore, the order directing the sum of $30 to be taxed in the costs as the Attorney's fee, is reversed, and the cause is remanded, with directions to overrule the Attorney's motion.

Cord for plaintiff; *Cates, Attorney General*, for Commonwealth.

EJECTMENT.

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Taylor *vs* Fletcher.

APPEAL FROM THE BALLARD CIRCUIT.

Case 23. *Patents for Military Land. Parol evidence. Scire Facias.*

September 29. CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated and judgment of the Circuit Court.

ROBERT FLETCHER, claiming under four patents for 160 acres each, issued in September, 1835, on four entries, made in the Receiver's office, under the laws enacted for

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the appropriation of the vacant lands on the south west side of the Tennessee river, brought an action of ejectment against Read and others, who were, and had been for some years, occupants upon the land claimed under a patent to Wm. Croghan, for 1,366¾ acres, bearing date the 30th November, 1826, founded on a survey made on the 9th December, 1825, by virtue of an entry made on a military warrant, on the 7th of August, 1784. Fletcher succeeded in the Court below, in obtaining a verdict and judgment, and the defendants have appealed to this Court.

It is urged, on the part of the plaintiff below, that though the patent under which the defendants claim is older in date than the patent of the plaintiff, that the survey and patent embraces land entirely different from the land embraced by the entry, and that the entry embraces no part of the land claimed by the plaintiff, and that the patent is declared void by the 4th section of the act of 1820, (2 *Stat. Laws*, 1043,) and should be treated as a nullity. On the part of the defendants below, it is insisted that the survey and patent of Croghan are not variant from the entry, but embrace the precise same land embraced and intended to be appropriated by the entry, and if they did not, that the plaintiff has no right to impeach the patent of Croghan, as his survey was made and patent issued long prior to the entry of the plaintiff, which was made and allowed by the Receiver, knowingly, in violation and fraud of the 17th section of the act of 1821, (2 *Stat. Laws*, 1051,) and 16th section of the act of 1825, (2 *Stat. Laws*, 1057,) the first of which provides that the Register shall not sell, and the last, that the Receiver shall not sell any section or portion of a section of land which may be included in any military entry or *survey*, provided he is satisfied of such interferance by an attested copy of such entry or *survey* being served on him, or otherwise, and that no entry could be made of lands that had not been previously exposed to sale and stricken off to the State.

The general rule is that a patent may not be impeached collat-

In the case of *Bledsoe's devisees* vs *Wells*, (4 *Bibb*, 330,) which was a case in which a patent had issued on a Treasury warrant, which had been located within that

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TAYLOR vs FLETCHER.

erally by extrinsic evidence *de hors* the patent itself. (4 *Bibb*, 330,) cited and approved.

tract of country reserved for the officers and soldiers, in contravention of the express inhibition of the statute of 1779, this Court say, "we are not of opinion that parol evidence of a fact *dehors* the patent, was admissible in this case for the purpose of avoiding or defeating the patent. For though a patent, when it appears on its face to be illegal, may be considered void and treated as a nullity, yet if it appear perfect on its face, it cannot be vacated by matters *dehors* the patent, but by *scire facias* or other regular mode of proceeding, instituted for the purpose of vacating it." The doctrine here asserted, seems fully sanctioned and sustained by the authorities referred to and other English authorities. A patent is *record* evidence that a title has passed from the Commonwealth, isued under the great seal of State by the competent authorities, and while it remains in force, and is not vacated or annulled by some direct mode of proceeding, calling in question its validity, should not, in the general, be collaterally impeached or questioned, unless in the case where its own nullity, for illegality, appears on its face, in which case the evidence of its nullity is of as high grade as the evidence of the grant.

It is true fraud viciates the most solemn proceedings, as judgments, decrees or patents. But we apprehend that fraud cannot be relied upon or proven to impeach either, collaterally in the trial of an issue at law, but only in a direct proceeding, the object of which is to reverse, annul or vacate the same, and that either should be regarded, in the general, as importing absolute verity, until reversed, vacated or annuled by some direct proceeding, affording as high grade of their annulment as of their creation.

There are exceptions to the general rule. 1st. Where the Legislature has declared that the patent shall be void if issued in contravention of a described state of case And 2d. Where they have declared the patent shall be deemed *fraudu-*

There are two exceptions to the rule here laid down, with respect to the impeachment of patents. The first is where the Legislature has declared that the *patent* shall be *void*, if issued in contravention of a described state of case; the second is, where they have declared that the *patent* shall be deemed *fraudulent*, if issued under similar circumstances. Whatever might be our opinion as to the propriety of those exceptions, they have been too long and repeatedly sanctioned and sustained by the decisions

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of this Court, commencing with the case of *Dallam* vs *Handley*, (2 *Marshall*, 418,) and ending with the case of *Sutton* vs *Menser*, (6 *B. Monroe*, 433,) now to be questioned.

lent if issued under similar circumstances, (2 *Marshall*; 6 *B. Monroe*, 433.)

In the two exceptions referred to, the Legislative enactment is made to apply to and *act directly* upon the *patent*, annuling the same, and may imply an authority to prove by parol, on the trial of a collateral issue, those facts which will bring the patent under the legislative denunciation.

Subjecting the two patents that are brought in conflict in this case, to the rule and exceptions intimated, and it follows that the patent of the plaintiff below cannot be impeached or its invalidity shown, by parol proof, in the trial of the issue between the parties. Though it was obtained obviously and knowingly in contravention of the legislative enactments referred to, and perhaps by a fraudulent combination between the Receiver and plaintiff, these enactments or any other that we have seen, do not declare the *patent fraudulent* or *void;* and cases might occur in which both the locator and Receiver might be ignorant of the interferance of the claims entered, with any entry or survey of a military claim.

Patents issued upon Kentucky land warrants for lands south of Tennessee, cannot be collaterally questioned even when coming in contact with a patent on a military entry survey; but the latter may be impeached by such proof.

But as the statute of 1820, (2 *Stat. Laws*, 1343,) expressly declares, in reference to the military entry under which the defendants claim, "that any *patent* issuing on a survey made contrary to the location, shall be *void* to all intents and purposes, so far as the same may be different or variant from the location," the defendant's patent falls within the exception to the general rule before intimated, and may be impeached by the plaintiff by the introduction of parol or other proof showing the variance between the entry and patent; and so far as such variance is shown to exist, the patent of the defendants may be treated as a nullity, and afford no protection to the defendants.

The operation of the statutes and general rule, with the exceptions referred to, presents a hard case. Junior patents obtained in fraud of the law, founded upon the pitiful consideration of twelve and a half cents per acre, are made to prevail in case a variance between the entry

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TAYLOR vs FLETCHER.

and patent is shown, against an elder patent founded upon the meritorious consideration of military services rendered in our revolutionary conflict.

But though the defendants may not be able to succeed, but the plaintiff may prevail to the extent of the variance, if any exists, in the trial of the issue in ejectment, we can hardly believe that the defendants or elder patentee, in that event, would be without remedy.

It is said by that learned commentator, Blackstone, (3 *Vol. B. Com.* 261,) "where the crown hath *unadvisedly* granted any thing by letters patent, which *ought* not to be *granted*, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent, is by writ of *scire facias* in chancery. This may be brought either on the part of the King, in order to reserve the thing granted, or if the grant be injurious to a subject, the King is bound, of right, to permit him, (upon his petition,) to use his royal name for repealing the patent in a *scire facias*."

The *scire facias* in the name of the King, was the ancient and appropriate proceeding for the repeal of a patent, which may have issued, injuriously effecting the rights of others, founded upon a false suggestion, and the first patentee here may sue in the name of the Commonweal th for that purpose.

It is also said in the 5th vol. of Comyn's Digest, title Patent, 356, "that if a patent is founded upon a *false suggestion*, the King may have a *scire facias* for repealing it." "So if the King grant, by his letters patent, the *same thing* to *several persons*, a *scire facias* lies for repealing the *last* patent: (4 *Inst.* 88.) And in such case the *scire facias* shall be brought by the *first patentee*: (4 *Inst.* 88, *and other authorities referred to.*) And a *scire facias* by the *last* patentee shall not be allowed, though he *seems* to have the *right* with him."

"A *scire facias* for repealing a patent may be sued in chancery, or in the King's Bench, (4 *Inst.* 72, 79, 88; *Dy.* 197, *b.*; 3 *Lev.* 220;")

"The patent itself is a sufficient record, upon which a *scire facias* may be founded for repealing the same."

The Commonwealth in this republic, occupies, in many respects, the place of the King in England, and the proceedings of course should be instituted in the name of the Commonwealth, if such proceedings would lie here.

The authorities referred to pretty clearly indicate, as we conceive, the course to be pursued, and the remedy to be obtained by the elder patentee under military entries,

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against those fraudulent claims which have been knowingly located so as to interfere with them. The patentee under the military entry is injured, if his lands be taken by those speculating claims, and the Commonwealth but little benefitted. This survey having been made, and perhaps in his absence, and without his knowledge, by the regularly constituted surveyor, and a patent issued thereon, if the land embraced in his survey and patent be taken he looses all, as well the land embraced in his patent, as that embraced in his entry, as the entry could not be resurveyed and carried a second time into grant. And though the Legislature had declared the patent void, so far as the same varied from the entry, they had expressly interdicted the sale or location of claims originating under the laws made for the appropriation of the vacant lands in that region, from interfering with the *survey* of the military claimant, thereby indicating a clear intention to reserve to the Commonwealth the entire control over the subject unembarrassed by subsequent patents to individuals under her laws. And had the Commonwealth never full control over the subject embraced by these surreptitious entries, made knowingly in violation of her laws, it cannot be questioned that she would either confirm the patents issuing in good faith upon these military claims, though variant from the entry, or adopt some other regulation honorable to herself and just towards that meritorious class of claimants

The elder patentee and Commonwealth are both interested in vacating and annuling junior patents which have been surreptitiously obtained, producing a conflict with those military claims, and it would seem to us not only to be the right, but also the duty of the Commonwealth, to permit her name to be used in a *scire facias* at the instance and upon the motion of the elder patentee, to repeal, annul or vacate the junior patents which have been thus fraudulently obtained. The Commonwealth had, by the Legislature, from time to time reduced the price of the lands on the S. W. side of the Tennessee river, until they were reduced from one dollar and a quarter to twelve and a half cents per acre, believing as she did, that all the better lands were taken, she never could have

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TAYLOR vs FLETCHER.

contemplated that those ninepenny claims would be located on the very best lands of the country, previously embraced and patented to military claimants. But of course, as the question as to their remedy is not questioned, nor necessary to be determined in this case, we are not to be regarded as deciding in its favor definitely, nor of decreeing as to the effect that the denunciation of the statute against the military grant may have upon the same. But allowing to the plaintiff the privilege in this contest, to show by parol proof the varience between the patent and the entry, or rather the departure of the survey and patent from the calls of the entry, and we are perfectly satisfied that the verdict in this case was unauthorized by the proof, and should have been set aside.

To enable a plaintiff in ejectment to recover against a patent issued upon a military warrant, he must show by *clear, satisfactory* and *unequivocal* evidence, that the patent varies from the entry and the extent of such variance. (*Ray* vs *Woods*, 2 *Ben. Monroe*, 217.)

To entitle the plaintiff to recover against the military patent, under which the defendants claim, it lies upon him to show, by *clear, satisfactory* and *unequivocal* evidence, that the patent varies from the entry, and the extent thereof. To do so, he must show that the entry was in *fact located* and *intended* to be located in a different place, and to embrace different land from that embraced in the patent. It is the want of identity between the entry and patent, and not the want of notoriety in the objects called for in either, that renders the patent void. And this want of identity it lies upon the plaintiff *clearly* and *unequivocally* to make out in proof, or the patent, which is *high record* evidence of a *perfect title* for the land it embraces, must prevail. The entry was made more than sixty years ago, and it cannot be expected that the place of the location, or intended location, can be now shown by living witnesses. All that can be now shown, must be shown by circumstantial evidence, as the correspondence or want of correspondence of objects found upon the ground, with those called for in the entry, or the like circumstantial proof. If, therefore, there be a set of objects found upon the ground embraced by the patent corresponding as well with the calls of the entry, as another set of objects found at another place, we cannot conceive how the jury or Court could determine in favor of the one or the other set of objects, so as to justify them in finding against, and treating as annuled the

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elder patent. If so, the military claimant would not have been safe in embracing in his survey the land embraced by either set of objects. It is certainly true, that in such a state of case, the precise location of the entry, and consequent variance between it and the patent has not been made out by *clear, satisfactory* and *conclusive* evidence which would authorize and sustain the finding of the jury against the elder grant. That sort of evidence was deemed necessary in the case of *Rays* vs *Woods, &c.*, (2 *B. Monroe*, 217,) and still deemed necessary to justify the finding of the jury against a military patent.

The entry of Taylor tested by these rules, and evidence in this case, and his patent sustained.

In this case, the entry of Wm. Croghan, under which the defendants claim, was made on the 7th of August, 1784, in the following words: "No. 346. Wm. Croghan enters 1,366⅔ acres, on part of a military warrant, No. 25, beginning at Gen. Clark's upper corner of an entry of 1,500 acres, No. 265, lying on a branch of Mayfield creek, at the corner next the creek, running thence east, 440 poles; thence south, and with Gen. Clark's line for quantity." Gen. Clark's entry is as follows: "August 6, 1784, No. 256, Geo. Rogers Clark enters 1,500 acres, part of a military warrant, No. 2,292; beginning at the *foot* of the *high land*, where the *first branch of Mayfield* creek above the *Bayou*, on the south side, passes through it, to the bottom or low grounds; running thence south, 75 east, 500 poles; thence at right angles, westwardly, for quantity."

The plaintiff below claims the stream now called Lott's branch, as the branch called for in Clark's entry, and his beginning at the foot of the high land, about one half mile from its mouth, where it passes through the high lands into the bottom, and the creek or slough just below the branch which runs out of Mayfield creek into the Mississippi river when the latter is low, and out of the Mississippi into Mayfield creek, when the Mississippi is high, and which never ceases running the one way or the other, as the *Bayou* called for in Clark's entry. If this be the true place of Clark's entry, then Croghan's entry, which calls for his upper corner, next to Mayfield creek, when run out according to its calls, will embrace no part

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TAYLOR vs FLETCHER.

of the land now covered by his patent or embraced in the patent of the plaintiff.

But the defendants claim the stream now called Trueman's creek, as the branch called for in Clark's entry, and a slough or Bayou, which runs out of Mayfield just below the creek on the south, and again unites with the creek about a half a mile below, as the Bayou, and the point where Trueman's creek passes through the high lands to the low ground, as the point of Clark's beginning. Croghan's survey has been run out, and his patent has issued thereon, regarding the foregoing as the true and proper locative calls of Clark's entry, and has been made nearly in conformity to the same. And if made entirely in conformity to the same, or based upon Clark's entry as thus laid down, and run out accordingly, the greater part of the land claimed by the plaintiff, and perhaps all the occupants on the same, would be embraced and covered in common, by the entry and patent of Croghan.

We are perfectly satisfied that there is a more perfect correspondence between the calls of Clark's entry and the objects found upon the ground at the place designated by the defendants, than at the place claimed by the plaintiff, and the circumstances exhibited in this record, tend more strongly to show the place selected by the defendants, as the true place, rather than that selected by the plaintiff. It must be borne in mind that Clark's, Croghan's, and the the entire block of entries exhibited in the record, were made in August, the dryest month in the year, and all were made from the 2d to the 12th of the month inclusive, and were probably made by the same company of locators, as the country was then a savage wilderness. On the 6th of August, when Clark's entry was made, the stream now called Salty branch, was in all reasonable likelihood, a dry ravene, and not a branch. The witnesses describe it as a very small stream, which runs in wet weather and goes dry in dry weather, and some of them say it resembles more a deep ravene, cut by the flowing of water from the high grounds in wet weather, than a branch or creek. The creek below that runs out of Mayfield into the Mississippi, claimed now as

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a Bayou, was never called or known by that name, nor does it answer the description of a Bayou better, if as well, as the one claimed by the defendants as the Bayou called for. It has been known for many years past as the back slough or creek, and as the town creek, and as we think, is better named by calling it a creek or branch of Mayfield creek, than a slough or bayou. Besides, an entry was made in the name of Wm. Croghan, on the 2d of August, only four days before Clark's entry was made, and most likely by the same company of locators, and the stream now claimed as a bayou, was called a *creek*. It being called a *creek* on the 2d of August, 1784, it is highly probable, indeed almost certain, that it would not be called a bayou only four days afterwards. Again, the bluff below the mouth of Salty branch, is said to be the most notorious and attractive object, from the mouth to the source of Mayfield. It is strange, therefore, and almost incredible, if Clark's entry was intended to be located on Salty branch, that those bluffs should not be called for as the best object to give identity, as well as notoriety to the land intended to be embraced by the entry.

On the other hand, the stream now called Trueman's *creek*, and sometimes *branch*, was most likely, in the dry month of August, a small stream, and might well be denominated a branch. Besides, it is in fact a branch or limb of Mayfield, and when speaking in reference to both as Clark's entry does, it might well be called a branch. Again, the locators were no doubt Virginians, and it is proven that they are in the habit of calling pretty large streams branches.

There is a slough or bayou just below Trueman's creek, which has for years past, been promiscuously called a slough and bayou, and which answers better the description of a bayou than the stream or creek claimed by the plaintiff as a bayou. The foot of the high lands through which Trueman's creek runs, is about three quarters of a mile or a little more, from the mouth of the creek, and which point was most likely the point intended as Clark's beginning.

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Gaithers vs Brown.

There are other circumstances which we will not stop to enumerate, tending to the satisfactory conclusion that the place claimed by the plaintiff was not the place intended to be embraced by Clark's entry, and that the place claimed by the defendants is, in all reasonable likelihood, the true place intended to be embraced by the same.

It is, therefore, the opinion of this Court, that the judgment of the Circuit Court be reversed, and cause remanded, that a new trial may be granted.

Cates & Lindsey and Morehead & Reed for appellant; *Harlan & Craddock and Pirtle* for appellee.

Motion.

Gaithers *vs* Brown *et al.*

Appeal from the Nelson County Court.

Case 24.

Division of land. Jurisdiction.

September 30. Chief Justice Ewing delivered the opinion of the Court.

Case stated.

This was a motion in the County Court, to appoint three Commissioners to divide among his heirs, the lands descended from George W. Gaither, deceased. There were six heirs, the plantiff, G. A. Gaither and four others. One of the four had sold and conveyed her undivided one sixth to Geo. A. Gaither, and two others had conveyed their parcel to George G. Gaither, so that G. A. Gaither held one sixth as tenant in common with the heirs and one sixth as parcener, and George G. Gaither held two sixths as tenant in common.

The statute of 1810, (2 *St. Law*, 1071,) applies only to, and authorizes the County Court to divide lands between parceners and not to cases where part is held as tenant in common and part in parcenary, and the County Court has no jurisdiction in the latter case.

The proceeding is obviously under the statute of 1811, (2 *Stat. Laws*, 1071, and intended so to be. That statute it is clear, does not authorize the proceeding. It applies only to a case where lands have descended and are held in parcenary, and makes no provision for a case where the lands are held in part as tenants in common and in part as tenants in parcenary. And the jurisdiction conferred on the County Court being special and limited, cannot, by construction, be carried beyond the case expressly provided for.

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The heirs or some one of them holding lands in parcenary, are authorized to make a motion to the County Court for the appointment of Comm'rs. under the statute 1810.

The chancellor in dividing lands among tenants in common, or parceners, will consult the interest of all, without prejudice to any, and lay off the part or portion to which each is entitled adjoining and in convenient form.

The *heirs*, or any one of them, are alone authorized to make the motion for the appointment of *three* Commissioners to make partition of all the real estate *descended* in *parcenary*, among them as *parceners*. No power is given to the Commissioners or the Court, to adjudicate upon the interests held by others or to make partition in such a case.

Though the motion is made by those who held as tenants in common, in part, and who now ask the reversal of the order and proceeding, that can make no difference. If the County Court had no jurisdiction to make the partition, it can have no binding efficacy upon any of the parties. It must be mutually binding upon all, so as to pass the title of each to the other, or cannot be binding upon any.

But if the County Court could exercise jurisdiction in the case, it should surely be governed by those rules of equity by which a Court of equity would be governed in making partition, namely: to allot the parcels of each together, or as near as may be, without doing injustice to others, and should not, as they have done in this case, with respect to the two shares of each of the plaintiffs, separate and allot each share in distinct parcels, remote from each other. Such an allotment is calculated to do manifest injustice to the plaintiffs, without benefit to those who held a single share.

The order of the County Court is reversed, and cause remanded, that the partition may be set aside and the motion for the same dismissed at the costs of the plaintiffs below; and the costs of this Court are divided.

B. Hardin for appellants; *Harlan & Craddock, Hewitt and Morehead & Reed* for appellees.

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CHANCERY. **Gibson *vs* Moore, &c. and Parmele, &c. *vs* Same.**

APPEALS FROM THE LOUISVILLE CHANCERY COURT.

Case 25. *Fraudulent sales. Bona fide purchasers.*

October 1. JUDGE BRECK delivered the opinion of the Court.

The grounds of equity stated in the bill.

THE appellants, complainants below, exhibited their several bills in chancery, alledging that Moore obtained from them goods and merchandize to a large amount, under false pretences, and with the fraudulent intent of procuring without paying for the same. That he brought them from the city of New York, where he had thus fraudulently procured them, to the city of Louisville, where attachments had been levied upon them by numbers of his creditors, upon the alledged ground that he was, and for some time had been engaged in running off his goods and effects, and converting them into money, with a view to set at defiance and defraud his creditors. That after the levy of these attachments, Moore had transferred to one Hamilton Smith, a large quantity of goods, including a portion of those obtained from the complainants, in trust for the payment of the attaching creditors and some others.

The complainants further alledge, that Smith and the attaching creditors had notice of the fraudulent acts of Moore, in procuring from them a portion of the goods attached, and embraced in the deed of trust, and which, or the greater part thereof, still remained in the possession of Smith.

They insist that having been defrauded and swindled out of the possession of their goods by Moore, no title had passed to him, and they pray that they may be restored to them, and that the contract between them and Moore may be rescinded.

Answers. Smith and the attaching creditors, and others, provided for in the deed, were made defendants and answered. They admit that attachments were sued out against Moore

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as alledged, and the execution of the deed of trust by him to Smith, but deny that they had notice of the complainants claim, and insist and rely that they occupy the attitude of *bona fide* purchasers for a valuable consideration, and without notice. Moore had absconded and was proceeded against as a non-resident.

In regard to the facts of the case, it may be assumed, that Moore obtained the complainants' goods by false representations as to his means. condition and intentions, and it may be presumed, with the fraudulent intent of not paying for them. That a portion of the goods thus procured by Moore, were embraced in the deed of trust, and in the possession of Smith. That after the attachments were levied the deed was executed and in consideration and to secure the payment of just debts due by Moore. It may also be assumed that the deed was obtained by Smith and the *cestui que trusts*, without notice of the complainants claim, or any defect in the title.

Decree of the Chancellor.

The Chancellor was of opinion that the complainants were not entitled to the relief sought, and accordingly dismissed their bills with costs, and they have appealed to this Court.

The appellants base their right to relief upon the first section of the act of 1838, (3 *Stat. Laws*, 116,) and also upon the equity of their case upon general principles.

The provision in the act of 1838, relied upon, is as follows:

"That when any person or persons shall purchase any lands, goods, wares, merchandize, or other property, with the fraudulent intent of procuring, without paying for the same, the Courts of chancery in this Commonwealth, shall have power and jurisdiction, upon bill filed for that purpose, to vacate the contract, and cause the property to be restored or compensation to be made therefor; and for that purpose, to attach the property and make all necessary and proper orders for the safety and forthcoming of the same."

The statute of 1838, (3 *St. Laws* 116,) does not authorize the Chancellor to take property

We cannot presume that it was the intention of the Legislature, by this provision, to confer upon a Court of Chancery jurisdiction and power to cause property fraudulently procured as described in the act, to be restored to

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GIBSON vs MOORE, &c.

which may have been fradulently purchased without intending to pay for it, from the hands and possession of an innocent purchaser thereof for valuable consideration, and restore it to the first vendor.

the vendor, wherever and in whosoever hands it might be found. It does not in terms go that far, and we are unwilling, by construction, so to extend it. As between the vendor and the fraudulent vendee, the power to rescind the contract and cause the property to be restored, is undoubtedly given. So also, when the property may have passed from such vendee to a purchaser with notice, or without a valable consideration, or to one who had participated in the fraud in procuring it, the vendor might pursue it, and the Chancellor would be authorized to decree its restoration. But we cannot suppose the Legislature intended to authorize a Court of Chancery to seize the property and cause its restoration, regardless of the rights of those who may have acquired it from the fraudulent vendee. Upon this construction of the act, it can only be considered as declaratory of the jurisdiction and power of a Court of Chancery, as previously claimed and asserted.

In *Bradbury and Foster* vs *Keas*, (5 *J. J. Marshall*, 446,) this Court expressly recognize in a Court of Chancery, all the jurisdiction and power which we think can be rightfully claimed under this act. In that case, the Court say the jurisdiction cannot be doubted. We are, therefore, of opinion that the complainants are entitled to no relief in virtue of the statute, which they would not be entitled to without it.

The question then arises whether the complainants have manifested their right to relief upon the general principles of equity.

The general principles of equity requires that a vendor from whom purchases have been made with the fraudulent design of not paying for them, should show that he has pursued his remedy with reasonable vigilance after the discovery of the fraud.

These goods were purchased by Moore in the city of New York, in August, 1844, for which he gave the complainants his notes payable in six months. Moore seems to have commenced his purchases in that city in April, 1844, and at that period, and prior to the 1st November, 1844, he purchased from various mercantile houses, goods to the amount of about forty thousand dollars, for which it appears he paid comparatively but a small sum. The goods were brought to Louisville, where Moore figured as a merchant. The fraud was committed in New York, where the complainants resided. When they discovered it, does not appear, nor do they alledge. They make no

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effort to reclaim their goods till five or six months after they had been purchased by Moore, and with their knowledge brought to Louisville. To entitle a defrauded vendor to vacate his contract and reclaim his goods, he must do it quickly after he discovers the fraud. The claimants in this case do not alledge, nor show that they have been reasonably vigilant in the pursuit of their goods after they obtained knowledge of the fraud.

But waiving this question, let us examine what is deemed the main and important question in the case, and upon which we are disposed to let it exclusively turn. And that is, whether Smith and the beneficiaries under the deed, do not occupy the atitude of *bona fide* purchasers for a valuable consideration, without notice, and as such, whether they are not protected against the complainant's claim.

Though goods be purchased with the fraudulent design of not paying for them, yet if before the vendor pursues them and sues for their recovery, they be conveyed in trust for the payment of previously subsisting debts of the purchaser, without knowledge of the fraud in their obtention, the vendor's right to be restored to the possession will be lost.

We have assumed, as we felt fully authorized to do, that the deed was procured without notice of any defect in Moore's title to the goods, or of any claim to them on the part of the complainants.

That Smith and the beneficiaries occupy the attitude of purchasers, and for a valuable consideration, may also be assumed. But it is contended that no new consideration was given, and that an old one is insufficient. The consideration consisted of debts due by Moore to the beneficiaries in the deed, who had at the time it was executed, attachments against Moore, and were in hot pursuit of him, and his effects. Upon the execution of the assignment the pursuit ceased. They found goods in possession of their debtor, which he surrendered in payment of their debts, and which were received while ignorant of any defect in his title.

Whether the attachments were formally dismissed upon obtaining the assignment, or permitted to slumber upon the docket, or whether all the estate and effects of Moore were embraced in it, is not deemed important to inquire, as we are of opinion an old consideration or existing debts, were amply sufficient to support it. This conclusion is sustained, we think, by justice and policy, and by principles settled by this Court in analogous cases. An elaborate review of all the authorities bearing upon the

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question, among which may be found cases somewhat in conflict with our opinion, is not deemed necesary, and will not be attempted.

Wherefore, the decree is affirmed.

Duncan for appellants; *Pirtle, Speed, Fry and Page* for appellees.

CHANCERY.

Brassfield *vs* Walker, &c.

ERROR TO THE BOYLE CIRCUIT.

Case 26. *Vendor and vendee. Rescission. Division of Lands.*

October 2. JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

BRASSFIELD purchased from Saunders 148 acres of land, at the price of $5,000, paid about $2000 in hand, and received a conveyance. Saunders being indebted to Walker, in part for the purchase of portions of the same land, Brassfield, by agreement of the parties, executed two notes to Walker for so much of the purchase money of the 148 acres as had not been paid down, and gave him a mortgage upon the land to secure the payment. And Walker executed to Brassfield a covenant to convey, through Christopher Lillard, 32 acres of the same land to Brassfield, the legal title being supposed to be in Lillard. And Walker being indebted to Christopher Lillard, for this and other land, Brassfield, some time after his purchase from Saunders, executed his note, with security, to Christopher Lillard, which was received in discharge of the amount due to him from Walker, and the same amount was credited as payment on one of Brassfield's notes to Walker.

Brassfield being in the undisturbed possession of the entire tract of 148 acres, recovered a judgment against Walker for failing to convey the 32 acres, and Lillard recovered a judgment against Brassfield on the note executed to him. To injoin this latter judgment, and obtain a rescission of the entire contract, on the ground of defect of title, Brassfield filed his bill against all the other parties above named. And Walker, by cross bill, injoined the judgment of Brassfield against him, and he also sued

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to foreclose his mortgage. Before these bills were filed, C. Lillard and wife had conveyed the 32 acres to Walker, and Walker and wife had made a deed for the same to Brassfield; and many other deeds having been produced in the progress of the cause, some of them made after its commencement, the Court, on hearing, dismissed Brassfield's bill and dissolved his injunction without damages or costs, and decreed to Walker the relief which he sought.

Waiving the question as to the effect which, under the circumstances above stated, a rescission of the entire contract should have upon the judgment obtained by Christopher Lillard, and also the question whether there might not have been a partial rescission, if there were a defect of title as to a part of the land; we are of opinion that there was no ground for a rescission to any extent, and that the decree is substantially correct.

A vendee who has received a conveyance and been let into possession, and is in the undisturbed enjoyment of his purchase will not be heard for a rescission on account of dormant and doubtful claims which he may stimulate others to assert against his title.

1. In the first place Brassfield, without fraud or misrepresentation, and so far as appears, without mistake of fact, received from Saunders a deed of conveyance with warranty, and was entitled also, to the benefit of other warranties, under which he obtained and still holds the quiet possession of the whole land; and although as Saunders had become a non-resident, the Court might, if there were a palpable defect of title, and a well grounded apprehension of loss, enjoin the collection of the purchase money until the danger was removed, or even rescind the contract, it certainly would not indulge the purchaser in mere technical objections, affecting at most but small portions of the title, threatening no interruption of his possession, and of which he should be presumed to have been aware before his purchase; much less should it encourage him in searching out defects and stimulating the assertion of dormant and doubtful claims with the view of defeating a fair and equal contract, the benefits of which he is enjoying in safety. In the present instance the effort of the complainant to stir up a litigation for his land has failed, and we think his attempt to point out any substantial defect of title, involving danger of loss, has been alike unsuccessful.

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BRADFIELD vs WALKER, &c.

The title of a vendor presumed to be valid by length of possession coupled with an interest as heir and vendee's bill for rescission dismissed.

2. The objections to the title are two fold: First, on the ground that as to between 36 and 40 acres, James Lillard, under whom the title is claimed, had not title himself. And secondly, on the ground that even if he had title, there was no effectual division of the land after his death, and no release of title among his children and their descendants, by which the vendors in this case could effectually convey the 148 acres, by metes and bounds, so as to exclude therefrom the title of the other parties entitled under James Lillard. As to the first objection, it appears that in 1801, John Lillard, the father of James and of nine other children, of whom five were *femes covert* and the others males, devised a part of his home tract, ascertained to be 116 acres, to his wife during life or widowhood, if she chose to remain on it; but upon her marriage or removal, it was to revert to his estate and be disposed of as thereinafter directed. The subsequent direction is, that his executor should sell the home tract. After his death his widow, who was a second wife and the mother-in-law of James Lillard, remained upon the land devised to her for two or three years, James Lillard also residing there. But in the year 1804, she moved from it to a place in the neighborhood, belonging to James Lillard, and in 1809 or 1810, sold off her effects and went to another county to reside with another son-in-law. From 1804 until his death in 1837, James Lillard remained upon the 116 acres, using and claiming it as his own, as his descendants and their alienees have done until the present time. The children of John Lillard, two of whom were his executors, all resided in the State, and all except one, within twenty miles of the land. The widow died about twenty five years before the cause was heard, and more than twenty before it was brought. It was proved by one of the daughters of John Lillard, that she had sold her interest to James, and had understood that the other heirs had sold their interest to him. Other witnesses say substantially the same. And during the long period since 1804, there has been an entire acquiescence in the claim and possession of James Lillard, except that one of his married sisters, who died about twenty five years ago, is said to have said, that she got

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little or nothing for her interest, and perhaps had not conveyed it, and that her children ought to sue for it. They have failed, however, to sue, although their father has been dead many years, and although Brassfield seems to have assured them that they could recover. Now it is evident, that upon the removal of John Lillard's widow in 1804, either the executors or heirs had a right to the possession, and it is scarcely possible that the great lapse of time has not barred the remedy of all who were then entitled, even if James Lillard had not acquired their claims. But there is a presumption amounting to a reasonable certainty, and especially when fortified by the proof, that he did buy out the other heirs of his father, and about the time when he took possession. And even if these purchases were not obligatory upon all the *femes* at the time, still the male heirs were bound, and were moreover, subject not only to the presumption arising from lapse of time, but to the running of the statute, which absolutely bars the claim of themselves and their heirs. From the great lapse of time, the presumption must also be indulged against the *femes covert* and their heirs, that there was a valid conveyance, or that their claim is barred, unless in those cases in which it is shown that neither they nor their heirs could have sued until within twenty years. And even in such case, (of which, however there is no attempt to prove more than one or two, and these are but imperfectly made out,) it might be well questioned whether, as their right was held jointly with other heirs who are barred, their own remedy would not also be barred. But even if there were a valid subsisting claim to portions of the 116 acres, outstanding in the heirs of some of the daughters of John Lillard, still as the claims of the sons and their heirs are not only barred, but must be presumed to have been transferred to James Lillard, and as these claims, (as will be hereafter shown,) are all concentrated in the grantors, by or under whom the conveyance is made to Brassfield, and as the claim of James Lillard to the entire tract of 116 acres is also concentrated in the same hands, even the successful assertion of claim by the five married daughters of John Lillard or their heirs, would not probably involve the ul-

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BRASSFIELD vs WALKER, &c.

timate loss to Brassfield, of any part of the 36 or 40 acres now in question, and which would be more than covered by the interests of four of John Lillard's sons.

Where there had been a division of land amongst heirs by County Court Comm'rs, though not strictly legal, long acquiesced in, and a vendee had received title with warranty and was in the enjoyment of his purchase, the chancellor refused to rescind, especially as the alledged defect in the conveyances extended only to a small part of the land sold.

With regard to the second objection which is founded upon the alledged invalidity of the division made between the devisees or heirs of James Lillard, by County Court Commissioners, it is sufficient to say that although that division may not have been, in itself, valid or sufficient to secure the titles of the parties interested as heirs or devisees of James Lillard, yet it has been so recognized by all of these parties who were capable, and by those who had a right to act in the premises for others under disability, that its defects are no longer available. At most this confirmation of the division is defective as to only two thirds of one eighth part of the entire real estate of James Lillard, being the interest of four of the six children of his daughter, Mrs. Willis, to whom lot No. 4, not covering any part of the land now in question, was assigned in the division. If the proceedings by which this interest of two thirds of one eighth was sold under a decree as the estate of the infants, and purchased by Walker be invalid, and if the four infants may still assert an undivided interest in the whole estate, to the extent of two thirds of one eighth, which is one twelfth, still as all the other claimants, except the wives of Saunders, Walker, C. Lillard and Wm. Hamilton, whose wives were daughters of James Lillard, have conveyed their interests to these four persons recognizing the division, and as the titles of these four persons and their wives have, by regular conveyances, been concentrated in Brassfield, to the extent of the 148 acres purchased by him from Saunders, and as the 148 acres do not comprise one half of the entire landed estate of James Lillard which was divided, there is no danger that the one twelfth which the four Willises might claim, will ever be thrown upon the 148 acres; nor is it shown that there is any probability of any claim ever being asserted by them even if they are not barred by the proceedings referred to, The bare possibility that Brassfield may be put to some trouble in maintaining his title under the deed, of which there is no probability, furnishes no ground for a rescission, and especially under the cir-

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cumstances of the purchase as above referred to. But as the deeds by which the title has been thus fortified, have some of them at least, been made since the filing of the bill, and as C. Lillard, whose judgment was enjoined, was involved in the question of title, we cannot say that either damages or costs should have been awarded to him upon the dissolution of the injunction.

Wherefore, the decree is affirmed.

Harlan & Craddock for plaintiff.

Blackburn *vs* Davidson.

CHANCERY.

ERROR TO THE FRANKLIN CIRCUIT.

Case 27.

Equitable interest and choses in action.

October 6.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

UPON a judgment and return of no property, against Thos. P. Hart, Davidson filed his bill on the 17th of March, 1842, charging that numerous persons were indebted to said Hart, by note, account or *otherwise*, and among others, the plaintiff in error, Blackburn, and praying that they should answer and show how much they respectively and severally owed to the said Hart, by note, account, or *in any other manner*, and enjoining them from paying to the said Hart, the *money* they severally owed him, and the said Hart from receiving the *money* owing to him by the said persons, or assigning away any *demand* held by him against them, until, &c. An injunction issued according to the prayer of the bill, and was served on Blackburn on the 9th March, 1842, who answered at the next May term, that he was not indebted to the said Hart *one cent in money*, but stated that in the latter part of February, 1842, he purchased of the said Hart nine milch cows, for which he agreed to pay said Hart $150, to be paid in milk only, at not less than eight gallons per day, and as much more as the said Hart wanted, at ten cents per gallon, until the whole of the price was paid; and he relies on his contract, and does not believe that he can be com-

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BLACKBURN vs DAVIDSON.

pelled to pay in a different manner from his contract. Upon the filing of this answer, no other step was taken by the complainant, except to renew the suit against Hart's heirs, until the April term, 1845, when the Chancellor having disposed of the case as to the other defendants, appointed a Commissioner to ascertain if he could find a purchaser of the milk, to be delivered at the rate of eight gallons per day, at the late residence of said Hart. And the Commissioner reporting immediately that he had found a purchaser, the Chancellor made an order upon Blackburn to deliver the milk or pay the money, allowing him till the next term to make his election. At the next term Blackburn failing to attend, or to make any election, a decree was rendered against him for the money, from which he has appealed to this Court.

The debtor of a debtor against whom a bill is filed by a creditor to have the benefit of a demand or chose in action against him, cannot be required to violate his contract, and if property is to be delivered, unless a receiver be appointed by the Chancellor, he may still go on to pay, if the consequence of his failing so to do might subject him to pay money instead of property. If he has failed to pay property according to his contract, and rendered himself liable for the value thereof, he may be directed to pay such value to the compt.

The presumption is, that the delivery of the milk commenced with the purchase of the milch cows, which was in February, before the bill was filed, as that was the time of the contract, and there being no other day stated for the commencement of the delivery, it must be presumed that the day of the contract was the day. Blackburn looking to the means which he then and would possess for the ensuing period of time sufficient to enable him to pay the milk, might well make the contract. But to require him to deliver the milk at any other subsequent period, would be to impose an obligation on him variant from the terms of his contract, and with which he might be wholly unable to comply, and necessarily expose him to the payment of money, which he never undertook to pay. Had he kept the milk on hand, as he might do in relation to money or many other articles of property, which he might be injoined from paying, it would have spoiled, and been of no value to either creditor or debtor. What then could he do but to continue delivering the milk until a receiver should be appointed, on the motion of Davidson, the creditor, and a rule served on Blackburn to deliver the milk to him, that he might make sale of it as it was delivered, the proceeds to be applied, on the hearing of the cause, as the Court might direct. Such an order would have enabled Blackburn to

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comply with the terms of his contract, and have afforded to the creditor the fruits of the same. It never could have been contemplated by the statute authorizing choses in action to be injoined, that a debtor of the debtor should be forced to make a breach of his contract, by retaining in his hands property owing, when such retainer would render the thing retained valueless to creditor and debtor, nor to enable the Court to impose new terms of contract upon the debtor, with which he might be wholly unable to comply, and thereby be compelled to pay the money.

But the more especially in this case should the receiver have been appointed at the instance of Davidson, upon the coming in of Blackburn's answer. He was not injoined from paying the *milk*, but only from paying *money* to Hart. He promptly answered that he owed no *money*, and set forth the nature of his contract. Upon the coming in of his answer, if Davidson desired to have the proceeds of the milk, he should have procured some person to be appointed to receive it as intimated. His failing to do so, or to injoin its payment to Hart, left Blackburn no alternative but to pay the milk to Hart, to retain it on hand or to be guilty of a breach of his contract, and expose himself to a liability to pay cash instead of milk, which he could not be bound to do.

But as his contract was a continuing one, and the greater part of the milk was to be paid after the answer was filed, and the milk may not have been paid, and if not paid he became liable to Hart for the money, and his liability to Hart might be subjected to the payment of the complainant's demand, upon the hearing, or he might be made to pay to the complainant the amount receivable by Hart in consequence of its breach, a Commissioner should be appointed upon the return of the cause, to inquire into and ascertain the fact whether payment in milk has or has not been made, and if not made, the value thereof, or the value of so much thereof as shall not have been paid, should be decreed to the complainant. But if the milk has been paid to Hart, then the bill as to Blackburn, should be dismissed.

The decree is reversed, and cause remanded, that an

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CHAMPLIN vs FOSTER & CUNNINGHAM.

inquiry may be directed as to the payment, and further proceedings had as indicated in this opinion.

Morehead & Reed for plaintiff; *Harlan & Craddock and L. Hord* for defendant.

CHANCERY.

Champlin *vs* Foster & Cunningham.

ERROR TO THE MONTGOMERY CIRCUIT.

Case 28.

Mortgages. Liens. Practice in chancery.

October 2.

JUDGE MARSHALL delivered the opinion af the Court.

Where bill is filed to foreclose a mortgage upon real property incumbered by prior liens, it is proper to make all persons holding such liens parties, or if prior suits are pending to enforce prior liens, to consolidate the suits and avoid a sacrifice of the property by multiplying sales of small parts.

THE proceedings in this case have been exceedingly irregular, both as to the orders and decrees made in Court, and as to the manner in which they were executed out of Court. But for many of these irregularities and their consequences, there is now no cure, at least none upon this writ of error.

The mortgagor was doubtless prejudiced by the omission to make the holders of the prior liens upon portions of the mortgaged premises parties to this suit, or to consolidate the three suits for the enforcement of the liens, if it could be done, or by the failure to await the sale under the prior partial liens, before selling under the mortgage. In consequence of these omissions, there seem to have been five separate sales of different parcels of the same tract of land, and three of them under the mortgage, first, of the land not covered by the prior liens, and then of two very small parcels left after the sales under the prior liens. The result seems to have been, a sacrifice to some extent, in the sale, and this might have been expected. But the validity of the sales was not questioned in the Circuit Court, and the purchasers are not before this Court. There is no question, therefore, as to the sales, nor do we know that they could have been successfully attacked at any time. The error assigned for not making the prior encumbrancers parties, is unavailing, because their incumbrances have been satisfied by sales, and the whole subject, in which there was any common or conflicting interest having been disposed of, they

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have no interest in any matter which can now be litigated between these parties. The propriety of the decree of sale under the mortgage, or of the disposition made of the proceeds, is a matter between the mortgagor and mortgagees, unless the purchasers could be involved in the question as to the propriety of the decree of sale.

A mortgagor has an interest in the ascertainment of debts secured by mortgage, and therefore in every decree for the sale of mortgaged property, day of payment should be given to him, and the sum to be paid should be ascertained; and when a sale is ordered, the sum should be ascertained and stated, and the sale reported, and the surplus fund if any, should be paid over to the mortgagor.

But whether the sales, or any of them, can be set aside or not, the mortgagor has a deep interest in the application of the proceeds, and also in the ascertainment of the debts paid by the sale of his property and of those which remain unpaid. It was the duty of the Circuit Court to ascertain by its decree, how much money was demandable from the mortgagor as due under the mortgage, to give day of payment for the whole sum, and on failure to pay, to direct a sale of the mortgaged premises or so much as was necessary for the payment of a specified sum, not greater than that named in the decree *nisi*, and by further decrees to show what sum had been raised and what land had been sold, and there being more than one debt to be satisfied and more than one claimant under the mortgage, to direct the appropriation of the proceeds of sale among the several debts and claimants.

In this case the bill sets up claims as secured by the mortgage, amounting to nearly $10,000. The claim is for indemnity as sureties of the mortgagor, in debts, the largest of which was not due when the bill was filed, and but few had been paid by the complainants. The answer questions the right of indemnity upon a bill of exchange for $2,500, and calls upon the complainants to show what debts they had paid. This call was immediately answered, and a decree *nisi* entered at the same term, giving day of payment for certain sums which, upon the pleadings, appeared to be undisputed, amounting, altogether, as the decree is copied in the record, to less than $2,000, and which, even if there be an omission of one item in the transcript, could not have exceeded $3,000. In order to obtain the decree at that term, the complainants discontinued, (without prejudice,) their claim on account of the bill for $2,500, one of the debts due before the bill was filed, and the defendant was given until the first day of the next March term of the Clark Circuit Court to

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CHAMPLIN vs FOSTER & CUNNINGHAM.

pay the sums mentioned in the decree, with an intimation that on failure, the mortgaged premises should be sold.

Shortly after the rendition of this decree, the defendant obtained a change of venue to the Montgomery Circuit Court; and at the March term of that Court, and before the first day of the Clark Circuit Court, a decree was rendered for the sale of the mortgaged premises, not for the sums mentioned in the decree *nisi*, to which no reference is made, but to satisfy the debts in the bill and answer set forth. The whole mortgaged premises are directed to be sold without any reference to the admitted prior liens, or to the amount of the debt. The bonds for the price are directed to be taken payable directly to the complainants, and the commissioner is directed to convey the land and deliver the possession to the purchaser, upon the execution of proper bonds for the purchase money. At a special term, in July, 1843, the commissioner reported a sale of the "said land," and the purchase of 108 acres and 14 poles at the price of $4,054 30, without intimating that the whole tract was not sold. But at the September term, 1843, a further decree was rendered, which, after referring, for the first time, to the suits of the prior incumbrancers, not introduced into this record, recites that after satisfying their decrees, a small portion of each of the parcels, (covered by their liens,) remained unsold, and decrees a sale thereof, in the same manner as before, without any reference to the amount due on the mortgage, or to the amount of debts satisfied by the former sale. At the same term, the commissioner's deed under the first sale, was acknowledged in Court and ordered to be certified. And at the succeeding March term, 1844, the report of sales under the last decree, amounting to $140, was made and confirmed, and a final decree was rendered reciting merely that the proceeds of the sales of the mortgaged premises fall short of satisfying the debts and liabilities enumerated in the mortgage, and decreeing the costs against the defendant.

Besides the two reports showing the amount of sales, there is a previous report showing the amount of rents received from the mortgaged premises under an order ap-

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pointing a receiver at the earliest stage of the suit. But except the first interlocutory decree, which seems to have been disregarded, there is no decree or order of the Court, and therefore, nothing upon its permanent records, stating the sums raised from the mortgaged premises, nor the application thereof, nothing to show the amount due on the mortgage, and no decree giving day of payment. But the commissioner was referred to the bill and answer to ascertain a contested and uncertain demand, and was at liberty to sell the whole of the land for a much larger sum than was due, taking the bonds payable to the mortgagees.

Some of the errors manifest in these proceedings, and among them that of prematurely decreeing a sale of the land, are, as already said, now incurable, and it would be useless to enquire into the question whether the rendition of the decree ought not to have been postponed on Champlin's motion to file an additional answer and cross bill, and to continue the cause. Had the decree of sale been proper without the offer to file the cross bill, the decree might have been made notwithstanding the filing of the cross bill; and as that bill sets up claims against Foster and not against Cunningham, it should have been allowed to be filed on the sole condition that the litigation arising on it with Foster and others, not before parties in the suit, should not obstruct the distribution of the proceeds of sale so far as Cunningham had a *right* to be indemnified under the mortgage; and the Court should have retained its power over the proceeds of sale instead of directing them at once to the hands of the complainants. As the case stands, we do not perceive that any advantage will accrue to Champlin by directing that upon the return of the cause to the Circuit Court, he should be permitted to file his cross bill, since the fund arising from the sale is not in the power of the Court, and the demand set up against Foster in the cross bill, may be as effectually asserted, and perhaps with less confusion in a separate suit. It will, however, be left to the discretion of the Circuit Court to allow these matters to be brought in by cross bill or otherwise, in the future progress of the case. But it is essential that the *record*

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BANFIELD vs BRUTON.

in this suit should show what portions of the mortgage claims were due and satisfied by the rents and sales of the mortgaged premises, and what portions still remain unpaid; and if by the rents and sales or otherwise, the mortgagees were indemnified for their payments or liabilities, as secured by the mortgage, this should be ascertained, and if the sales and rents, added to other means which have come to their hands, or to the hands of either of them, were more than sufficient to satisfy the just claims of the party receiving them against Champlin as secured by the mortgage, such party should be decreed to pay over to Champlin the surplus remaining after satisfying the indemnity secured by the mortgage. And such proceedings should be had by commissioner or by additional pleadings, or both, as may be necessary for the ascertainment of the matters referred to.

Wherefore, the decree is reversed, and the cause remanded for further proceedings, and decree in conformity with this opinion.

Peters, Hazlerigg and Goodloe for plaintiff.

COVENANT.

Banfield *vs* Bruton.

ERROR TO THE MONTGOMERY CIRCUIT.

Case 29.

Warranty. Covenants.

October 3.

JUDGE BIBB delivered the opinion of the Court.

Case stated.

THIS was an action of covenant upon the following obligation:

"I have this day sold to T. Banfield my negro boy James, aged about twenty two years, which I warrant to be a slave for life, also sound and healthy, this 18th February, 1842. JAMES BRUTON."

The plaintiff assigned as a breach of this covenant, that the slave was not at the time of the sale about twenty two years of age, but much older, to-wit: of the age of about twenty six years. A demurrer to the declaration as to this assignment, was sustained, and whether cor-

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rectly or not, is the first question presented for consideration.

The rule is well settled, that to constitute a warranty, it is not necessary that the word *warrant* should be used. Any words of an import equivalent to it, and showing an intention of the parties that there should be a warranty, are sufficient.

To constitute a covenant of warranty, it is not necessary that the word *warrant* should be used; any word or words of equivalent import showing an intention to warrant, will be sufficient.

But from the phraseology of the obligation in this case, we can hardly infer that it was the intention of the parties that the warranty should extend to the age. The clause in that respect is rather descriptive of the slave, and at most can be regarded as a representation.

"I have this day sold to T. B. my negro boy J. aged about 22 years, which I warrant to be a slave for life," &c., is not a warranty as to the age of the boy J., but at most but a description or representation.

We are of opinion, therefore, the demurrer was properly sustained.

The motion for a new trial, we think, was also properly overruled.

Upon the ground that the verdict was against the weight of the evidence, this Court, as has been repeatedly decided, will not interpose, unless the preponderance against the finding is palpable and flagrant, and which we think is not the case here.

To authorize the Court to set aside a verdict and grant a new trial on the ground that the verdict is against the weight of the evidence, it should appear to be flagrantly so.

Nor are we of opinion that sufficient ground for a new trial was made out by the affidavits.

Wherefore, the judgment is affirmed.

Peters and French for plaintiff; *Apperson* for defendant.

Roope, &c. *vs* Rodes' Adm'r.

MOTION.

ERROR TO THE EDMONSON COUNTY COURT.

Case 30.

Administration. Counter security.

October 6.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

UPON a rule obtained against the administrator of Rodes, to show cause why he should not give counter security to his sureties, upon whose application the rule was made, the administrator declared that he was neither able nor willing to give bond and counter security as required. Whereupon, the Court ordered that the administrator be removed from office as such, on condition that

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ROOPS, &c. *vs* RODES' ADM'R.

the sureties making the application, or either of them, would take upon themselves or himself, the administration of the estate according to law. The sureties objected to the condition annexed to the removal by this order, and have brought the case to this Court. The order is in effect nothing more than an offer of the administration to the complaining sureties, and a refusal to relieve them from their existing responsibility in any other manner. And this mode of relief being based upon the inability of the administrator to furnish other security for their indemnification, the question is, whether the Court was bound to give, or the sureties entitled to have any other relief.

The sureties of an adm'r. requires counter security, he answering that he was *unable* and *unwilling* to give it, the Court made an order that "he be removed from office on condition that the sureties making the motion, or either of them, would take upon themselves the administration of the estate according to law." Held that there was no error in the order of the Cty. Court to the prejudice of the sureties for which it should be reversed.

The 35th section of the act of 1797, (1 *Stat. Laws*, 664,) provides, that on the petition of securities conceiving themselves in danger, &c. the Court shall summon the executor or administrator, "and make such order or decree thereupon, to relieve and secure the petitioners by counter security or otherwise, as to them shall seem just and equitable." If it had been shown that the administrator was in fact able to give counter security, or that there was even ground to believe that he was able, there might have been a peremptory rule requiring it, which might have been prosecuted by attachment or otherwise, until performance was either coerced or found to be impracticable. But if the Court was satisfied in the first instance that he was really unable to comply with the requisition, it was not bound, and especially when no motion was made by the parties interested, to institute measures of coercion which promised to be of no avail. In the absence of all proof contradicting the assertion of the administrator, and of any motion for coercive proceedings against him, we assume that the Court was satisfied that he was unable to give other security, and that he was in fact unable. At any rate, as the case stands, the sureties have no right to complain that no steps were taken, upon the basis that the Administrator was able to give counter security, and especially as there was no proof that he was actually squandering the estate. What then was to be done? The Court certainly was not bound, and as we think, not authorized, for the sake

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of relieving the sureties, who had voluntarily become responsible for the due administration of the estate, either to release them without providing others, whereby the estate would be left without security, in the hands of an insolvent administrator, nor to remove the administrator without committing the estate to some one else, whereby it would be left entirely unprotected. They could not abandon the care of the estate, and were bound to see that it had that protection which the law intends to provide. They had a right to appoint a new administrator or a curator, to take charge of the estate, upon giving bond, &c. But no body applied for such an appointment, and it does not appear that any one was willing to take it. As there was already an administrator who had given bond with approved security, the case was not such, as under the 57th section of the act, (1 *St. Laws*, 670,) authorized the Court to commit the estate to the Sheriff in his official character and under the responsibilities of his official bond. There was no more right to impose the burthen of administration and of executing a new bond upon him than on any one else. And there was just as much right to impose it upon the original sureties as on any other person. They did not propose any other person, nor intimate that any other was willing to assume the burthen. And it is obvious that their assumption of the administration themselves, would have relieved them, as far as they could be relieved by the appointment of any other, against their responsibility for the first administrator.

The statute says the Court shall relieve and secure them by counter security or otherwise, as to them shall seem just and equitable. This is a broad discretion. And as the complaining sureties were instrumental in having the estate placed in charge of the administrator from whose mismanagement they now apprehend danger, and as in case of his inability to make them safe by bond with new security, their own custody of the estate is as sure an indemnity against his future misconduct or mismanagement, as they can have; and as there is an apparent propriety in imposing this burthen on them rather than on any other who is unwilling to assume it, we cannot

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TIBBS vs TIBBS' EX'R.

say that the course pursued by the Court in making their acceptance of the burthen the condition of removing the adminstrator, and the mode of relieving them was either unjust, inequitable or inappropriate. And we are satisfied that there has been no such abuse of the discretion given to the County Court in fixing the mode and measure of relief, as requires or would justify the interposition of this Court.

It is to be observed, that the refusal of the County Court to grant any other relief to the sureties beyond the offer of the adminstration to themselves, and the refusal of this Court to direct further relief upon the case as presented, will not preclude the sureties from any future application for relief under the statute, nor is the County Court precluded from granting, on any future application, such relief as under the statute, is within their discretion. If the administrator is or shall be able to give counter security, it may still be required, or the administration may still be disposed of according to the power and discretion of the Court under the law.

We only decide that as the case is now presented, there is no ground for reversing the order of the County Court, which is, therefore, affirmed.

Harlan & Craddock for plaintiff.

CHANCERY.

Tibbs *vs* Tibbs' Executor.

ERROR TO THE HARRISON COUNTY COURT.

Case 31.

Wills. Dower. Slaves. Partition of estates.

October 7.

JUDGE MARSHALL delivered the opinion of the Court.

A widow renouncing the provisions of her husband's will, is entitled, under 24th sec. of the statute of 1797, to one third of the slaves of which the husband died pos-

THE only question in this case is, whether a widow who has renounced the provision made for her by her husband's will, is entitled, in a case where the husband has left no children, to one half of his slaves or only to one third.

The 24th section of the statute of 1797, concerning wills, &c., (2 *Stat. Laws*, 1544–5,) provides expressly for the case of a widow renouncing the provision made for her by the will, and declares that in such case she

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shall be entitled to one third of the slaves whereof her husband died possessed, which she shall hold during her life, and at her death, they and their increase shall go to such person to whom they would have passed and gone if such declaration had not been made; and she shall, moreover, be entitled to such share of his other personal estate as if he had died intestate, to hold to her as absolute property. The 28th section of the same act, (1 *Stat. Laws*, 660,) providing for the case of a person dying intestate as to his goods and chattels, or any part thereof, enacts that after the funeral debts and just expenses paid, if there be no child, one moiety, or if there be a child or children, one third of the surplus shall go to the wife, (but she shall have no more than the use for life of such slaves as shall be in her share,) and the residue of the surplus, and after the wife's death the slaves in her share, or if there be no wife, then the whole of such surplus shall be distributed in the same proportions, and to the same persons as lands are directed to descend in and by an act of the General Assembly, entitled, "an act directing the course of descents," &c.

seased for life, and one third of the personal estate absolutely, though there be no children.

So far as the right of a widow in slaves of her husband is concerned, each of these sections is complete in itself. Each makes a perfect provision for the case it intends to provide for, and neither refers to the other, either to aid itself or to modify the other. The one making provision for the case of a widow renouncing the provision made for her in her husband's will, makes no discrimination founded on the fact of there being or not being children of the husband. In view of that section and as to the distribution of the slaves, such a fact is wholly immaterial. The case is precisely the same whether there be or be not children. The other section provides for a different case, the case of intestacy of the husband. And under that section and in the case of intestacy, there is a discrimination founded on the fact referred to, and a different rule is provided for the two cases which may arise under the section in consequence of the discrimination made. In the case of intestacy, if there be no child, the widow is entitled to one half, if there be a child or children, to one third of the slaves.

—But in case of the husband dying intestate as to his goods and chattels, or any part thereof, and without child or children, the widow, by the 28th sec. of the same statute, is entitled to one half, after personal debts and just expenses are paid; but she shall have no more than the use for life of such slaves as shall be in her share.

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TIBBS TO TIBBS' EX'R.

If it were conceded that there is, in the nature of the case, no more reason for giving the wife one half in case of intestacy, than for giving her half in case of renunciation, when there are no children to divide the estate with her, this concession, though it might be entitled to weight in a case of doubtful construction, can have none when the provision of the statute is express and clear. But we cannot say that there is no reason for discriminating against a wife who renounces a provision which her husband has deemed suitable and sufficient, and whether there was or not, the statute has not placed her on the same ground with regard to her portion in the slaves of his estate. It is indeed, contended that when the wife renounces the provision made for her, the husband is intestate so far as she is concerned, and therefore, the case comes within the principle if not within the letter of the 28th section. But this is not so. The renunciation of the wife may defeat the intended operation of the will, but it does not defeat, to any extent, the fact that there is a will. It does not make the husband intestate as to the whole or any part of his estate. But it is a sufficient answer to this argument, that the same statute which provides for the case of intestacy, provides also for the case of a renunciation by the wife; and that although in the other personal estate, (exclusive of slaves,) it gives her the same share as if her husband had died intestate, it does not refer her interest in the slaves to the same criterion, but gives her expressly one third. It seems, therefore, impossible to say that the Legislature intended that her interest in the slaves and in the personalty, should in all cases, be determined by the rule applicable to the case of intestacy. It cannot be said that slaves were particularly mentioned for the mere purpose of showing that in them the widow was to have but a life estate. For the 28th section makes the same limitation of her interest in case of intestacy; and by giving her, in terms, the same interest in case of renunciation as in case of intestacy, this limitation would have been sufficiently secured and the interest of the devisees, after her death, might have been distinctly and easily provided for; nor is it easy to conceive that the case of there being no children of the hus-

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band was not contemplated in providing for the case of renunciation, in the 24th section of the act, when that case is expressly provided for in making provision for the case of intestacy in the 28th section of the same act. And even if we could suppose that this case was not contemplated, still as the Legislature has made a general provision covering all cases of renunciation, without discriminating between those in which there were and those in which there were not children, we do not feel authorized to interpolate such a discrimination into the statute.

Wherefore, the order of the County Court overruling the exceptions of the widow and confirming the division allotting to her but one third of her husband's slaves, is affirmed.

Curry for plaintiff; *Trimble* for defendants.

Levi *vs* Evans.

ASSUMPSIT.

APPEAL FROM THE HARRISON CIRCUIT.

Assignor and assignee. Diligence. Evidence.

Case 32.

October 8.

CHIEF JUSTICE EWING delivered the opinion of the Court.

The assignor is not liable upon his assignment though there be a return of *nulla bona* when property is levied on and taken from the officer by writ of replevin, unless assignee loose the property in the replevin suit duly prosecuted, or is able to show that the property levied on was not subject.

THIS is an action of assumpsit, brought by Evans against Levi, upon an assignment of a note on Pleasant Tilly and Wm. Tilly, made by Levi to Evans, and a return of *nulla bona*. It was certainly the duty of Evans, the assignee and holder of the assigned note, to pursue, with due diligence, every reasonable means which the law afforded, and which the assignor, had he the possession and control of the note, would in all reasonable likelihood have used to make the debt out of the obligor before he can take his recourse against the assignor. That has not been done in this case.

1st. It appears that several articles of property were levied on and the Sheriff returns that they were taken out of his possession by a writ of replevin, sued out by a third person. It does not appear what has become of this property. It was the duty of Evans to defend the replevin, and subject the property to the payment of his judg-

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WOODWARD vs WOODWARD, &c.

If the debtor have property, tho' mortgaged, the assig'ee must sell the equity of redemption, or compel a foreclosure if the debts secured are less than the value of the property, and appropriate the balance if any after satisfying the mortgage to the payment of the debt assigned, before the assignor is liable. Proof by the assignor in a suit by the assignee upon the assignm't that the debtor had property mortgaged worth more than the debts secured, is competent. The return of *nulla bona* is not conclusive, but only *prima facie* evidence against the assignor.

ment, if he could, or show satisfactorily that it was not liable. He had no right to abandon the pursuit of the property levied on, and upon a return of no other property, upon that or a subsequent execution, to sustain his action for recourse against the assignor.

2d. If Tilly was in possession of property mortgaged to secure other creditors, more than sufficient to pay their debts, which was known to Evans, or presumed to be known, it was his duty to pursue that property by a sale of the equity of redemption, by *fi. fa.*, or a proceeding in chancery to subject the excess to the payment of his debt, after satisfying the mortgage creditors the amount of their demands.

The Circuit Court, therefore, erred in excluding the proof offered to establish the facts in relation to the value of the mortgaged property and debts, and means of knowledge on the part of Evans or the officer. The return of *nulla bona* is not *conclusive* but only *prima facie* evidence of the insolvency of the obligors: *McFadden* vs *French et al.*, (3 *B. Monroe*, 121.)

For these errors the judgment is reversed and cause remanded, that a new trial may be granted without the payment of costs.

Curry for appellant; *J. Trimble* for appellee.

CHANCERY.

Woodward *vs* Woodward, &c.

ERROR TO THE MONTGOMERY CIRCUIT.

Case 33.

Vendor and vendee. Lien. Notice. Purchaser.

October 8.

JUDGE BRECK delivered the opinion of the Court.

A deed reciting to be for a consideration paid and secured to be paid, is constructive notice to a purchaser that a part of the consideration remains unpaid, (6 *B. Monroe*, 67; *Ibid*, 74.)

THE deed from John Woodward to Mitchell H. Woodward, recites that it was made "in consideration of the sum of eight hundred dollars, paid and secured to be paid by the said Mitchell H. Woodward, the receipt of one hundred and thirteen dollars of which is hereby acknowledged," &c.

This deed was duly recorded, and according to the case of *Honore's Ex'rs.* vs *Bakewell*, (6 *B. Monroe*, 67,) and

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also of *Thornton* vs *Knox's Ex'r.*, (*Ibid*, 74,) was constructive notice to subsequent purchsers, that a portion of the purchase money remained unpaid at its execution.

Vendor has a lien for the consideration remaining unpaid, though a conveyance be made where a subsequent purchaser has constructive notice of the fact that it is unpaid.

For such unpaid residue a lien attached in favor of the vendor, unless it had been removed, waived or abandoned, which is not shown to have been the case. To the extent, therefore, that the purchase money from M. H. to John Woodward remained unpaid, the latter had a prior lien upon the land, which the Court below should have enforced.

It is manifest that the note exhibited by John Woodward upon M. H. Woodward for $687, was given for the residue of the purchase money, and there is no evidence that any other payments have been made thereon, except what are entered as credits upon the note. We are inclined to the opinion, in view of the whole record, that the credits should be applied as payments for the amount thereof, without interest, upon the note at the time when it became due. This opinion is based upon the supposition, that the credits as entered include interest upon the sums actually advanced up to that time. If this were not the case, interest should be allowed upon the credits from their date, as the advance payments were made at the request of John Woodward, and with an assurance that interest should be allowed. And as it is not entirely satisfactory that the interest is included in the nominal amount of the credits, the Court below, upon the return of the cause, will permit additional testimony in that respect, to be adduced.

A purchaser executed his note to a mortgagee of the land purchased, as part of the consideration to extinguish the mortgage, a balance of the consideration was yet due from his vendor of the land, for which he held a lien, because such vendor would enforce that lien, that fact constituted no ground for the

In regard to the two notes executed by Fitzpatrick to M. H. Woodward, in part consideration of the purchase of the land in contest, by the former from the latter, it seems to this Court that Fitzpatrick's injunction was properly dissolved and his bill dismissed. The notes were executed and assigned to Yocum for the purpose of procuring a release of his mortgage upon the land. They were received by him in discharge of his claim upon M. H. Woodward, secured by the mortgage. They were assigned to him in the presence of Fitzpatrick, written in a manner to render them acceptable to him, Yocum, and with an assurance on the part of Fitzpatrick, that they

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WOODWARD vs WOODWARD, &c.

extinguishment of the mortgage lien.

would be promptly paid. And he thereupon, and in consideration thereof, released his mortgage, and the trade between Fitzpatrick and Woodward was then consummated. Under such circumstances, Fitzpatrick virtually waived and abandoned any equity against the notes, which might then exist, or might afterwards arise as between him and Woodward. Yocum had at the time a valid subsisting lien upon the land, and which Fitzpatrick undertook, by the notes in question, to discharge. Yocum, therefore, cannot be affected by what would have been an available equity in Fitzpatrick, had the notes remained in the hands of Woodward, or had they been assigned under different circumstances.

The assignees of Yocum occupy the same attitude as Yocum would have occupied had he retained the notes.

The bill of Fitzpatrick was, therefore, properly dismissed, and his injunction improvidently granted before judgment upon the notes had been obtained, dissolved.

The decree, however, dismissing Fitzpatrick's bill, was erroneous in directing that each party should pay their own costs. We can perceive no sufficient reason why the defendants should not recover their costs.

The decree is reversed, upon both the original and cross errors, and the cause remanded, that the bill of Fitzpatrick may be dismissed at his cost, and his injunction dissolved. And upon the bill of the complainant, John Woodward, that his lien for the residue of his purchase money due from M. H. Woodward may be enforced.

After the foregoing opinion was rendered, the counsel presented a petition, asking a modification of the opiuion, to which the Court on the 3d November, 1846, by Judge BIBB, made the followiug response:

As we are still of opinion that *the two notes* assigned to Yocum were executed and assigned under such circumstances as to preclude Fitzpatrick from setting up any equity against them on account of the lien upon the land asserted by John Woodward, we perceive no ground or principle, which would authorize a modification of the opinion in behalf of Fitzpatrick, as sought by his counsel.

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It is true that a portion of the purchase money, paid down by Fitzpatrick, was by arrangement between the parties, including Yocum, applied to the payment of Woodward's debts, for which Yocum was bound as security. This matter, however, is not relied upon in the pleadings; but even if it were, we perceive no ground upon which Fitzpatrick could render it available as against Yocum. The contract as to the time and mode of payment for the land, was made between Woodward and Fitzpatrick. The only point of difficulty as between them in regard to the trade, was the release of Yocum's mortgage. When that was done, and the amount was paid to redeem the land from the execution sale, it was unimportant to Fitzpatrick whether the residue was applied in payment of debts for which Yocum was bound or not; it was not diverted from the payment of the purchase money still due from Woodward to his father, for Fitzpatrick purchased under an impression that nothing was due on that account, or if there was, that there was no lien; in requiring Woodward, therefore, to apply a portion of the purchase money in discharge of debts, for which Yocum was his surety, Yocum did no injury to Fitzpatrick; nor did he in so doing, render himself liable to refund on account of the prior lien, which has been since asserted by John Woodward.

There is neither allegation nor proof of any misrepresentation, fraud or concealment on the part of Yocum in reference to the transaction in any way; nor was he, in our opinion, under any obligation, legal or equitable, to Fitzpatrick, to make good the title of Woodward. It may be a hard case upon Fitzpatrick, but as it has not resulted from any fault on the part of Yocum, he is entitled to no relief as against him, but must look to his vendor.

The petition for a modification of the opinion is, therefore overruled.

Chiles and Hazlerigg for plaintiff; *French and Peters* for defendants.

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CHANCERY.

Cosby's Heirs *vs* Wickliffe.

ERROR TO THE WASHINGTON CIRCUIT.

Case 34.

Parties in chancery. Practice in chancery. Exhibits, proof of.

October 9.

CHIEF JUSTICE EWING delivered the opinion of the Court.

A chancellor will do equal justice to the creditors of a decedent by a pro rata distribution of assets.

THIS is a proceeding in chancery, instituted by Wickliffe to subject a fund in the hands of the administrator of John Cosby, deceased, to the payment of a debt due to him by D. C. Cosby, deceased, upon the allegation that the fund was payable to the estate of D. C. Cosby, deceased, and was instituted against D. C. Cosby's non-resident infant heirs.

The Chancellor erred in not requiring Bernard Abell to be made a party on his petition. A Chancellor desires to do equal justice to all the creditors of a decedent, by the rateable distribution of the intestate's funds among them, if there be not enough to pay all.

Where a bill is filed by one creditor to subject assets in the hands of the heir, another creditor on his petition showing that he is such, should be made a party, as he has a right to participate in the distribution of the fund.

An administrator has a right to insist on being mdea a party to a bill against the heir for the discovery of assets, and their application to the payment of debts.

And if Abell might not be entitled to a preference as a judgment creditor, he at least is entitled to a rateable share of the fund sought to be subjected to the complainant's demand. But the more especially should he have been admitted a defendant on his second application, upon showing that he had been appointed the administrator of D. C. Cosby, deceased.

The proceeding being against the infant non-resident heirs of D. C. Cosby, to subject a fund in the hands of the administrator of his father, to the payment of a debt asserted against his estate, in favor of the complainant, his legal administrator, the proper representative of the estate and the appropriate party to resist the claims asserted against the estate, should have been brought before the Court, so soon as it was shown that letters of administration had been conferred on him, as well that the estate might be defended by the appropriate representative, from unjust claims that might be asserted against it, as that the administrator might be afforded the opportunity

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to set up his own demand and just right, at least to a rateable part of the fund sought to be subjected to the payment of the complainant's demand, exclusively. Though the fund in part was in part the proceeds of land, it had the character of personalty impressed upon it, by the absolute direction of John Cosby's will, to sell and distribute the proceeds among his legatees. The administrator of Susannah Cosby was also a necessary party, and seems not to have been brought before the Court.

To authorize the proof of exhibits in chancery by oral evidence, notice of the day when the proof will be offered should be given to the adverse party or his counsel. They may be proved at, or before the hearing.

It seems that the complainant's exhibits were proved, *viva voce*, before the parties were before the Court, and without notice or rule, and on the hearing the proof was objected to and the objection overruled by the Circuit Court. The practice in England, when a party desires to prove exhibits, *viva voce* in Court, on the hearing, is to procure an order for leave to do so. But to entitle the party to make the proof, a copy of the order must be served on the Clerk of the opposite party, at least two days before the hearing: (1 *Smith's Practice*, 413.) The practice here has been to prove exhibits either at or before the hearing, and there can be no great objection to indulging the proof, as well *before* as *at* the hearing, as witnesses may, with most facility, be procured to attend. But we think notice of the day when the proof will be made, should be given to the opposite party or his counsel. Parties or their attorneys cannot always be expected to be in Court, and it is but reasonable that they or their counsel should be apprised of the day when the proof will be made.

Exhibits proved orally before the hearing, cannot be read upon the trial against those who were not parties to the suit at the time the proof was made.

In this case the parties not being before the Court at the time when the proof was made, nor having any counsel in attendance, nor notice given to any one, of the intended proof, the proof should have been suppressed. We will not now decide the case upon the merits, as the proper parties were not before the Court.

The decree is reversed and the cause remanded, that further proceedings may be had as indicated in this opinion.

Kelly for plaintiffs; *C. A. Wickliffe* for defendant.

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ASSUMPSIT.

Bright *vs* Wilson's Administrator.

ERROR TO THE LINCOLN CIRCUIT.

Case 35. *Set off. Pleading. New trial.*

October 9. JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

As this action of assumpsit was brought by Bright alone, against Wilson's administrator, we are of opinion that the defendant was not entitled, against the will of Bright, to set off a demand against Bright and Stephens jointly, on account of money paid as their security. The plea, therefore, should have been adjudged bad if it had been demurred to.

A defendant may plead as a set off to a demand against him, a demand due by the plaintiff and another, and if issue be joined upon the plea, it is then too late to object that the joint demands cannot be set off, the objection should have been by demurrer to the plea.

But as Bright was bound to the extent of the entire joint liability of himself and Stephens, and had a right, without the concurrence of the latter, to discharge it either by payment or by setting off, at any rate with the consent of Wilson, his separate demand against Wilson; and Wilson, therefore, had also the right, with the consent of Bright, to set off his demand upon Bright and Stephens against Bright's separate demand upon him, though he could not have done it without Bright's concurrence, when, therefore, Bright, instead of objecting to the proposed set off, on account of the joint nature of the demand, as he might have done by demurring, denies the fact itself upon which the demand against him is asserted in the plea, we think he should be understood as having waived any objection to the admissibility of the set off on legal grounds, and to have placed his objection solely upon a denial of the facts alledged as the foundation of the demand against him. If instead of setting up this demand by way of set off in a plea, Wilson's administrator had brought an action for it against Bright alone, it would have been at the option of Bright, either to have objected to the form of the suit on account of the non-joinder of the other party, or to have contested the demand on its merits, by a plea traversing or confessing and avoiding the facts alledged; and his adoption of the lat-

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ter course would have been a conclusive waiver of the former. It is true that in the particular case stated, there are positive rules with regard to the time and manner of making the objection to the form of the suit, which preclude the objection in any other mode, or at any other time. But these rules are themselves founded on and intended to effectuate a general principle of convenience and propriety, which clearly indicates that after a party has, in the first instance, passed by an objection purely formal, and putting his case upon its merits, has failed, he should not be allowed to disturb a just decision on the substantial merits of the case, on the ground of such objections.

The rule that a joint liability shall be asserted and enforced against all the parties liable, is a technical rule that is waived by a failure to present the objection at the first opportunity.

There are indeed, rules apparently formal, but which being deemed essential to the due administration of justice, are not waived by the failure to object to their infringement at the first opportunity. But the rule requiring that a joint liability shall be asserted and enforced against all the parties, is not of this character; and as there is no reason in the nature of the thing, why the defendant's claim against the plaintiff and another, should not, if there is no objection, be set off against the plaintiff's claim upon him, we see no reason for not implying consent and a waiver of the objection from the fact that the party who might have objected on legal grounds, objected only on the ground of the non-existance of the demand as against him. By denying the facts of the plea and tendering issue thereon, the plaintiff, in effect, consents that the claim set up, if proved to be just, may operate in this suit as a demand against him; and as his consent would have cured the defect of a separate suit against him for the same demand, so we think it cures the defect in the plea and makes the demand a proper subject of set off in this suit, and of a judgment against the plaintiff for the surplus, beyond the amount of his own demand.

To authorize a new trial on the ground that the verdict is contrary to the evidence, it must appear *to be very clearly so.*

Upon the evidence, we certainly cannot say that it clearly appears that Wilson did not, by his payment of the debt of Stephens and Bright, for which he was their security, acquire a just claim against them jointly, for reimbursement of the amount paid, nor that this claim has

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BEST vs HIGGINBOTHAM.

been satisfied by funds of Stephens in his hands, not otherwise rightfully appropriated; nor can we say, that upon comparison of the opposing claims of the parties, and the evidence in support of them, the jury were not authorized to find against Bright the balance stated in their verdict, and for which judgment has been rendered; and the motion for a new trial having been overruled by the Court, we should not be justifyed in setting aside the verdict on the ground of its being contrary to the evidence, unless it was clearly so.

Affidadit for a new trial on the ground of the discovery of testimony, should be accompanied by the affidavits of the winesses, or some good excuse for their non-production.

The affidavit stating a discovery of witnesses, is not accompanied by their affidavits, and makes no excuse for not presenting them; nor is it, in other respects, sufficient, as the matters to which it refers were directly involved in the issue.

Wherefore, the judgment is affirmed.

Kincaid for plaintiff; *Turner* for defendant.

COVENANT.

Best *vs* Higginbotham.

ERROR TO THE GARRARD CIRCUIT.

Case 36.

Jurisdiction. Consideration.

October 9.

JUDGE BRECK delivered the opinion of the Court.

Case stated.

HIGGINBOTHAM exhibited his bill in chancery against Best, seeking to recover against him about six hundred dollars, which he had paid for Best as his surety. Best relied upon a receipt from Higginbotham for the whole claim sought to be recovered. Higginbotham resisted the receipt upon the ground that the only consideration, upon which it was executed, was illegal and vicious, viz: an agreement on the part of Best not further to prosecute a warrant for perjury, then pending against E. Higginbotham, and which had before that time been sued out at the instance of Best, and upon which Higginbotham was then in custody.

The proof being satisfactory that such was the consideration of the receipt, the Court below was of opinion that it was void, and opposed no obstacle to the com-

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plainant's recovery, and decreed accordingly, and the defendant, Best, has brought the case to this Court.

Where the parties stand in *pari delicto*, the chancellor will not interfere.

It is insisted on the part of the plaintiff in error, that as both parties were equally guilty, equity should not interfere in favor of either. The general principle is certainly well settled, that equity will afford no aid to either party to render an instrument, the consideration of which is illegal and vicious, available. But the claim set up by the complainant was a meritorious one, and wholly unconnected with the prosecution set on foot, and abandoned by Best in consideration of the receipt.

But when a note is based upon a valid consideration, and a receipt is obtained against that note based upon an illegal and vicious consideration, the Chancellor will disregard the receipt, and let the demand be collected; the receipt being invalid does not affect the note.

The only question then is, whether the Chancellor was right in disregarding the receipt as a defence against the complainant's demand. The complainant asserted no right in virtue of it, but merely resisted it when set up by Best, as a valid defence. This, we think, he might do, without prejudice to his right to recover upon a valid and meritorious claim, not tinctured or affected with fraud.

Upon the question of jurisdiction, we have no difficulty. A Court of Equity had jurisdiction of the case, wholly irrespective of the attachment, which was sought and awarded the complainant. The failure in regard to the attachment would not deprive the Court of jurisdiction upon other grounds.

Wherefore, the decree is affirmed.

Caperton and McKee for plaintiff; *Turner* for def't.

Fox *vs* Miller.

CHANCERY.

ERROR TO THE MADISON CIRCUIT.

Motions. Paymasters. Evidence.

Case 37.

October 10.

CHIEF JUSTICE EWING delivered the opinion of the Court—Judge BRECK did not sit in this case.

THIS is a motion in the name of Miller, the commandant of the regiment, against Fox, the former paymaster, founded on a settlement made with him by the field officers of the regiment.

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HARROW *et al.* *vs* FARROW'S HR'S.

A fraud or a palpable mistake made by the field officers of the regiment on a settlement with a regimental paymaster, may be enquired into on the trial of a motion against the paymaster for his supposed delinquency and evidence conducing to the proof of mistake sh'ld have been received.

If fraud or palpable mistake has been committed in the settlement, there can be no doubt that it might be overhauled in a Court of Chancery, and we can perceive no good reason why the fraud or mistake might not be inquired into and corrected in the trial of the motion. There is nothing in the statute which makes the settlement so conclusive that it cannot be impeached. It is not a judicial proceeding, nor raised to the dignity of such proceeding. Jurisdiction being given to the County Court to hear the motion, it would seem proper that they should hear the defence. And if it should turn out, upon satisfactory proof, that the settlement and acknowledgment of Fox, that so much money was in his hands as paymaster, when no such sum was in fact in his hands, under an entire misapprehension as to his liability for fines which were not in his hands, but in the hands of a Constable for collection, and which never came to his hands, his acknowledgment was without consideration, and founded upon a mistake of law which exempts him from liability. The proof offered tended to the establishment of this state of case, and was improperly rejected by the County Court.

The judgment is therefore reversed, and cause remanded, that a new trial may be granted, without the payment of costs.

Harlan & Craddock for plaintiff; *Caperton and Goodloe* for defendant.

CHANCERY.

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7bm 126
137 49
138 81

Case 38.

October 12.

Harrow *et al.* *vs* Farrow's Heirs.

APPEAL FROM THE CLARKE CIRCUIT.

Attorney's at Law. Warrant of Attorney. Release of judgments.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

A judgment was rendered at the September term, in favor of John Doe, on the demise of Harrow and others, against Farrow's heirs, for five sixths of 120 acres of land, under the mandate of this Court, founded upon a

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verdict found in favor of the lessors in 1825, with a stay of execution till the next term of the Court, by consent of parties. At the September term, 1831, Henry Daniel, the attorney of the lessors, appeared in Court, and acknowledged satisfaction of the said judgment, and agreed that execution should never issue thereon, which was entered of record. In May, 1837, a *scire facias* was sued out by the lessors of the plaintiffs, to revive the judgment. The defendants appeared and pleaded the entry of satisfaction aforesaid, and consent that execution should never issue on said judgment; the plaintiffs replied that Henry Daniel had no legal authority to make said entry. Upon the trial of the issue, it appeared that one of the numerous lessors had employed Henry Daniel to bring suit against the defendants for about two thousand acres of land, embracing the land recovered, giving him authority to compromise the same, and agreeing that he was to pay all costs, and have one half of the land recovered. Daniel, by agreement with the defendants, for six hundred dollars in Commonwealth's paper, paid to him, all of which he retained and applied to his own use, and which at the time, was about one sixth of the value of the land, made the entry aforesaid on the record. The jury found a verdict for the plaintiffs, and a motion for a new trial being overruled, and judgment rendered thereon, the defendants have appealed to this Court.

An attorney at law has no authority to release a judgment obtained by him for his client, without a new warrant, he remains attorney while the judgment may be executed without new proceedings, for the enforcement of the judgment, not for its release.

We are perfectly satisfied that Daniel had no authority as mere attorney, to make said agreement or entry. He had no power as such to release the judgment, nor to chaffer with the opposite party, and receive money or any other thing, in satisfaction of a judgment for land. Though he remains the attorney while the judgment may be executed without new proceedings under his warrant to sue, such continuance of his power is for the enforcement of the judgment, and not for its release or extinguishment. Nor can it make any difference or add any superior sanctity to the arrangement, that it was entered of record in open Court. And if it be conceded that the authority to compromise the suit, made by one of the lessors, might give authority to compromise after judgment, which may be well doubted, it being the argreement of

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one only of the numerous lessors, it could not authorize the compromise that was made, surrendering the whole land jointly recovered.

The instructions given by the Court to the jury, as to their right to take into consideration, under the facts proven, whether Daniel was authorized by the other lessors to make the compromise, were as favorable to the defendants as they should have been.

The judgment of the Circuit Court is, therefore, affirmed.

Hanson and French for appellants; *Harlan & Craddock and Apperson* for appellees.

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7bm 128
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CASE.

Shelton *vs* Nance, &c.

APPEAL FROM THE TRIGG CIRCUIT.

Case 39.

Slander. Libel.

October 13.

JUDGE MARSHALL delivered the opinion af the Court.

Case stated.

THIS is an action on the case for a libel. The declaration avers that the defendants, six in number, composed and published, and caused to be published, of and concerning the plaintiff, the following words in a church book, viz: "a report raised and circulated by William Shelton, (the plaintiff,) against brother Nance, stating that he (Nance,) made him (Shelton,) pay a note twice, and proved by William Shelton to be false," and that the defendants read and caused to be read, the said libel, in the presence and hearing of divers good citizens, &c. By the inuendos it is shown that the plaintiff is the person referred to as having raised and circulated, and also as having disproved the report. A second and third count state the alledged libel, with slight verbal variation, and omit the averment that it was in the church book, and that it was read. A general demurrer to the whole declaration was sustained, and the only question necessary to be now considered is, whether the matter as above set forth, being in writing, constitutes a libel, for publishing which an action can be maintained.

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The distinction between verbal and written slander is well established, and in principle, well defined by modern adjudications. In the case of *McGee* vs *Wilson*, (*Litt. Select. Cases*, 188.) this Court recognizes this distinction, and after stating what is requisite to constitute verbal slander, goes on to say, "but words when written, if they tend to degrade or disgrace, or to render odious or ridiculous the person of whom they are written, will be libellous, and consequently actionable." The principle has been announced by other Courts and in many other cases, in terms equally comprehensive; and under the authority of the principle and of the cases to which it has been applied, we cannot doubt that written words imputing to the plaintiff the invention and circulation of a report calculated to injure the character and standing of a third person, and which he himself afterwards disproved, must tend to degrade the plaintiff, and bring him into ridicule and probably to render him odious. It is true, a person may by mistake, and honestly originate and circulate to some extent, a report unfavorable to another, which he himself may and should contradict whenever he discovers his mistake; and as all this if done innocently and without unnecessary or improper diffusion of the incorrect statement, might not imply more than excusable indiscretion or want of investigation on the subject, so a written statement of his conduct, not implying improper motive on his part, or a wanton disregard of the character of others, might have no tendency to degrade him or to render him ridiculous, and might, if there were a proper occasion for putting such statement in writing, be deemed excusable and harmless.

"Words when written which tend to degrade or disgrace, or render odious or ridiculous the person of whom they are spoken, will be libelous, and consequently actionable"—(*Litt. Sel. Cases* 188.)

If the writing complained of had stated that plaintiff, having by mistake, asserted and repeated that Nance had made him pay a note or debt twice, had upon investigation of the charge against Nance in the church, retracted it or admitted his mistake, even this, though it might not be deemed libelous, would be going farther in implicating the plaintiff than would be necessary in stating the acquittal of Nance, and farther than a just regard for the feelings of the plaintiff would authorize, unless it appeared clearly that his name was introduced rather by way

That the defendants composed, published and caused to be written in the church book the following: "A report raised and circulated by William Shelton (the plaintiff,) against brother Nance, stating that he (Nance,) made him (Shelton,) pay a note

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KUHL &c. KNAUER, &c.

twice, and proved by Wm. Shalton to be false." Held to be libilous and actionable.

of commendation for his honorable retraction of a mistaken assertion, than by way of blame for having asserted it in the first instance. As the case stands, the writing seems as if intended to record at once, the condemnation of the plaintiff and the acquittal of Nance, and indeed, to give rather a more prominent place to the former than to the latter sentence. Upon the face of the writing and of the declaration, there is nothing to excuse the reference to the plaintiff in the terms actually used, and nothing to mitigate the charge manifestly implied in the unnecessary use of those terms, that he had raised, (that is, invented) and circulated a report disreputable to Nance, which as it related to matters of which he himself was presumably cognizant, he knew or ought to have known to be false. Such a fact even casually written and published, and much more if placed upon the permanent records of a church, is calculated to degrade the person of whom it is written, and to render him odious, while the additional circumstance that it was by his own evidence that his previous statement was disproved, tends also to make him ridiculous, even if his previous statement was not knowingly false.

It follows that in our opinion the declaration is sufficient to show a cause of action, and that the demurrer should have been overruled. Wherefore, the judgment is reversed and the cause remanded, with directions to overrule the demurrer, and for further proceedings.

Woolley and Kinkead for appellant; *Morehead & Reed* for appellees.

CHANCERY.

Kuhl *vs* Knauer, &c.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Case 40.

Marriage. Evidence. Cohabitation.

October 13.

JUDGE BIBB delivered the opinion of the Court.

Case stated and decision of the Chancellor.

THIS is a controversy for the personal estate of Catharina Jacobina Christina Sudholtz or Kuhl, deceased, between Christian Kuhl, claiming as her surviving husband,

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and Michael Knauer and wife, claiming in right of the latter as her sister and heir.

Knauer and wife exhibited their bill claiming the estate, and Kuhl, who was made a defendant, set up claim in his answer and by cross bill.

The case turned exclusively upon the question whether there had or not been a marriage between Kuhl and the said Catharina. The Chancellor was of opinion that Kuhl had failed to establish a valid marriage, and consequently was not entitled to the estate, and having decreed accordingly, Kuhl has appealed to this Court.

The complainants alledge in their original bill, which was filed shortly after the death of Mrs. S., that no marriage was ever solemnized between her and the defendant. Kuhl, in his answer, says he married the deceased in August, 1842, and that she was, even till her death, his lawful wife, and acknowledged herself to be such, and was so recognized by her relations and acquaintances.

The complainants then exhibited an amended bill, in which they charge that the defendant's answer was evasive and insufficient in regard to his pretended marriage, and they repeat the charge that there had been no marriage in due form of law, or in the face of the church, between the defendant and said Catharina; and they call upon him by various specific and searching interrogatories, to answer and state when, where and in what manner, by whom, whether by a clergyman or a magistrate, and in whose presence such marriage, if there had actually been one, had been solemnized, and to state also the name of the person who had solemnized it, and of the witnesses who were present.

The defendant, in his answer, still avers his marriage, and that it had taken place at the house of the deceased, on the 18th August, 1842, in the city of Louisville, at night, after the usual hour for supper. He does not recollect that any one was present besides himself, said Catharina and the minister, who had been sent for and his attendance procured by her. That he was not personally acquainted, before that time, with the minister, to whom he handed the license, and saw that he had a paper de-

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KUHL vs KNABER, &c.

claring him to be a minister. That the ceremony of marriage was then performed in the usual manner, in the English language. In addition to these particulars in regard to the marriage, he states several others, and finally states that the name of the minister, who solemnized the rites, was Klein, who had been a minister at the German Lutheran church in Louisville, in the spring and early fall of 1842, and at whose church said Catharina was in the habit of attending. He further adds, that the preacher, at the time, gave a statement in writing, that such marriage had been celebrated, which had been lost.

Proof of cohabitation and recognition by the parties of each other as man & wife is for most purposes deemed sufficient proof of marriage, subject however to be rebutted; but in a suit by the relations of the supposed wife against the supposed husband for the property of the deceased supposed wife, where the issue is marriage in fact or not, such evidence is insufficient; a marriage in fact should be proved.

The proof of cohabitation by the parties subsequent to the period of the alledged marriage and of recognition by each other as man and wife, is ample and satisfactory. Such proof, for most purposes, has been deemed sufficient to justify a presumption of an actual marriage. It is *prima facie* evidence, but subject to be encountered and rebutted by countervailing testimony. But in this case, a direct issue is made up by the parties, whether there had been a marriage in fact, as claimed and relied on by the defendant. Under that issue, proof of recognition, acknowledgment of cohabitation, is not alone sufficient, under the circumstances of this case, to satisfy it and establish a marriage.

The effort on the part of Kuhl to establish it by other testimony, proved signally abortive, and is characterized, in view of the answer and testimony adduced, by an amount of fiction, fraud and perjury, rarely so glaringly manifest in a judicial proceeding. The answer and the testimony have undergone, by the Chancellor, a most searching, and for Kuhl, fatal scrutiny. Deeming it unnecessary to go into a tedious analysis and argument of the testimony and facts of the case, we need only remark that we entirely concur in the views of the Chancellor in regard to the testimony, and in his conclusions, that the defendant, Kuhl, has failed to establish a marriage with the deceased, either *de jure* or *de facto*.

In regard to the deposition suppressed by the Chancellor, we think there was no error, and in regard to other alledged errors, they are not deemed available.

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Wherefore, the decree is affirmed.

Greene, Marshall and Flusser for appellant; *Pilcher & Hauser and Fry* for appellees.

Beard's Executor *vs* Basye.

CHANCERY.

ERROR TO THE SPENCER CIRCUIT.

Husband and wife. Laws of comity. Bonds of indemnity.

Case 41.

JUDGE MARSHALL delivered the opinion of the Court.

October 14.

The statements and object of Basye's bill and amended bill.

IN January, 1833, Stephen Beard executed to E. Basye, a writing whereby he did "agree, bind and oblige himself to E. Basye for all loss, damages, trouble and expense that he may sustain or be at, provided there ever should suit be brought against him by Mary B. McDonald, or J. L. McGee, or their heirs, for any negroes that he may hereafter purchase from Joshua McDonald; and also bound himself to attend to and settle the present compromise, and to attend all other suits that may be brought (against) him for any negroes so purchased." It may be assumed, that shortly after the date of this writing, and upon the faith of it, Basye purchased from Joshua McDonald, six negroes, at the aggregate price of about $1,900; that Beard and McDonald having removed soon after to the State of Indiana, McDonald died there in the year 1833 or early in 1834. After which his widow, Mary B. McDonald, brought an action of detinue against Basye, for five of the six slaves which he had thus purchased, and also an action against Bryant Sloan for the sixth one, which had been sold to him by Basye. In 1833, while these suits were pending, Basye filed this bill against the representatives of Beard and others, to secure the indemnity promised in the writing above set forth, by attaching certain debts due to Beard's estate by persons residing in Kentucky. He alledges that he had paid $300 to Beard, and $400 to McDonald's legatee, and that his notes for $1,224, the residue of the price of the negroes, were still outstanding. He also alledges, that he is apprehensive

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BEARD'S EX'R. vs BASYE.

of losing the suit, and that he has been put to great expense, &c. in defending it, amounting to $300. In an amended bill, he alledges that the five negroes have been recovered from him in the action of detinue, of the aggregate value of $1,900, and that he has satisfied the judgment. And making the executor of Beard, who was also administrator of McDonald's legatee, a defendant in both characters, calls upon him to produce the outstanding notes for the price of the negroes, and prays a decree for the seven hundred dollars which he had paid, with interest, and for a cancelment of the notes, &c. &c.

Answer Beard's ex'r. and M'Donald's legatee made a cross bill.

Beard's executor, in answer, produced the three notes referred to, set out the claims of Joshua and Mary B. McDonald to the negroes, alledged the invalidity of Mrs. McDonald's claim, and charged that the judgment in detinue was obtained fraudulently by a collusive compromise between Basye and the attorney for the plaintiff, and that the verdict was rendered solely on the ground of this compromise, and not as the result of any investigation or decision by the jury. The answer as to these matters, is made a cross bill, to which Basye responds, denying the alledged fraud, and maintaining the validity of Mrs. McDonald's title, but admitting that there was a compromise, embracing the value of the slaves to be assessed by the verdict, and also providing that the plaintiff should recover neither hire nor costs. But he denies that any fact was admitted essential to the establishment of the plaintiff's title. And he alledges that the compromise was advantageous to Beard's estate, by placing a less value on the slaves than could have been proved, and by excluding from the recovery the plaintiff's costs. He also relies upon the fact, that Beard was notified of the suit, and bound to defend it, and that he did in his lifetime employ an attorney to aid in the defence, and says that the executor of Beard, though having full knowledge of the suit, not coming forward to his assistance, he did agree as to the value, hire and costs, and to make no further defence than was requisite to put the plaintiff on the proof of her right, and to secure him in his recourse, and he avers that the plaintiff's title was good.

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Upon final hearing, the Court decreed the re-payment by Beard's executor, of the $700 which had been paid, with interest from the date of the recovery in detinue, also the cancelment of the three notes remaining unpaid, and the payment of $200, the fee paid to the attorney in the action of detinue, in addition to his legal costs in that suit, and appropriated to the satisfaction of the decree so much of the attached funds as remained in the hands of the receiver, reciting that two sums specified as part thereof, had been paid over by him to the executor of Beard.

Decree of the Circuit Court.

The errors assigned by Beard's executor, question the correctness of every part of this decree. But the principal questions in the case, relate to the title of Mrs. McDonald, and the effect of the judgment in the action of detinue.

Errors assigned to this decree.

It appears, that before her marriage with Joshua McDonald, Mrs. McDonald was a widow, residing in the State of Louisiana, where her first husband had died, leaving her the owner of a considerable estate, in slaves and personalty; that in the year 1825, she married McDonald, who had no estate, and who, when he had become fully possessed of hers, persuaded her to come with him to Kentucky, under the promise that if she should be dissatisfied, he would take her and her property back to Louisiana; and also, as she says, that there should be no change in the ownership of the property. This removal to Kentucky took place about the year 1826, and in May, 1829, Mrs. McDonald filed her bill in the Circuit Court of Spencer county, alledging ill treatment in various ways by her husband, and a waste of her property, and praying for a divorce, and for a restoration of all her property, to which, as she alledged, she remained entitled by the laws of Louisiana, notwithstanding her marriage. At an early stage of this suit, an interlocutory order was made, directing one third of the slaves and land in the bill mentioned, (the land having been purchased with the funds derived from the wife's estate,) to be assigned to Mrs. McDonald. Under this order seven slaves were alotted to Mrs. McDonald, on giving bond to have them forthcoming to answer the decree of the Court, and

The substance of the record of Mrs. McDonald as her husband, cited.

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BEARD'S EX'R. vs BASYE.

fourteen were left with her husband, who had already given similar bonds under the restraining order granted on filing the bill. The twenty one slaves were all either of the original stock which had belonged to Mrs. McDonald in Louisiana, or their children.

Compromise of the last cited case.

In December, 1832, a writing was executed by persons professing to be the authorized agents of McDonald and wife respectively, which purported to compromise this suit by a relinquishment on the part of the husband, of all claim to the seven slaves which had been allotted to the wife, and which are stated in the instrument to have been owned by her prior to her last marriage, and to have belonged to her in her own right, under the laws of Louisiana, and by the will of her husband; and McDonald was also to pay to her the sum of $250, which when paid, was to be in full of all claim to dower, alimony or in her own right, which she had or might ever have in the estate of McDonald, who on his part, relinquished all claim, present or future, to the above mentioned property, and to all which his wife might thereafter acquire; and by the instrument Mrs. McDonald receives this provision in full of all claim, &c., and relinquishes all claim of dower, and in fee to the tract of land above mentioned, and also to fifteen slaves by name, all of whom were in fact, just as much her property as the seven that she retained. And it was further stipulated that the agreement should be entered as the decree of the Court whenever the $250 should be paid, &c.

On the 8th of January, 1833, an additional agreement was executed by the same parties, by which the $250 were released, and in lieu thereof McDonald relinquished to his wife 45 acres of land, being the one third which had been allotted to her under the interlocutory order, and she was to pay him $63 79, and this alteration was to be incorporated and made a part of the first agreement.

This is the compromise which Beard undertook to attend to and settle in the indemnifying bond, dated a few days after this last agreement, and on which the present suit was founded. But although placed among the papers of the suit to which it relates, it never was made the decree of the Court, and has received no judicial sanction.

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In May, 1834, the death of McDonald was suggested, and at the succeeding term the record states that the suit was dismissed on motion of the complainant's agent.

The controversy in regard to the slaves stated.

The six slaves sold by McDonald to Basye, and to which Beard's promise of indemnity or guaranty is understood to relate, are a part of the fifteen named in this compromise, and relinquished to McDonald; and except Jacob, who was sold by Basye to B. Sloan, are a part of of the fourteen which had been allotted to McDonald, or left with him under the interlocutory order. Beard's executor denying that Mrs. McDonald ever had title to the slaves in Kentucky, except under the compromise, relies upon that instrument as having transferred to her husband and extinguished in her, whatever right she may have had in any except those relinquished to her. It is contended on the other hand, that she did not lose her property in the slaves by her removal with her husband to Kentucky, and that the alledged compromise was imposed upon her by fraud, and was otherwise ineffectual to divest her of her right.

The civil code of Louisiana in regard to the property of *femes covert*, which renders voluntary separation of property between husband and wife void.

It is manifest from the articles of the civil code of Louisiana, 2,314 and 2,315, which are incorporated into this record, that the slaves in question having been the property of Mrs. McDonald before and at the time of her marriage, did not, by the marriage, vest in her husband, but remained her separate property of the class denominated dotal. Article 2,399, authorizes the wife to "petition against the husband for a separation of property whenever her dowry is in danger from his mismanagement or otherwise, or when the disorder of his affairs induces the belief that his estate will not be sufficient to meet her claims." By article 2,401, "separation of property must be petitioned for and ordered by a Court of Justice, after hearing all parties. It can, in no case, be referred to arbitration. Every voluntary separation of property is null and void, as it respects third persons, and the husband and wife between themselves." And by article 2,410, "the wife separated in person andproperty or in property only, has again the free administration of her estate. She may dispose of her movables," &c.

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Beard's Ex'r. vs Basye.

Assuming for the present, that the mere fact of removal to the State of Kentucky, did not transfer to McDonald the slaves of his wife, but that the property still remained in her, the question to be considered is, whether she was divested of her right by any subsequent act of her husband, or herself, or of both. If this question were to be decided by the laws of Louisiana, we should have to regret that so small a portion of those laws has been proved in this case. It is, however, clearly inferrable from the articles above cited, that until there has been a legal separation of person or property, or both, the husband has the right to administer or manage the dotal property of the wife as well as his own. Hence it is argued that his alienation of the slaves to Basye, was sufficient to invest him with an indefeasible title. But without conjecturing what may be the extent or the limitations of the husband's right before separation, or what title his *bona fide* alienee may acquire as against the wife, we think it may be inferred with sufficient certainty, that where the husband has no estate but his wife's dotal property and its proceeds, when he is evidently endeavoring to convert her property and divert it from the legal course of succession, and especially when upon these and other grounds the wife is before a competent tribunal, claiming a separation, and asserting her right to all the property in the husband's possession, one who, with a knowledge of these facts, purchases from him a portion of the very property brought by her upon marriage, and claimed in the proceeding for a separation, will find no protection in any article of the code of Louisiana. Even the principles of the common law, which pays so much regard to possession and ostensible ownership, would not allow a purchase under such circumstances, to impair the pre-existing rights of the wife. It would be strange indeed, if the laws of Louisiana would permit the rights which they specifically reserve to the wife, to be thus defeated. At any rate, we should not, upon conjecture, assume that this is so. We conclude, therefore, that upon the assumption that Mrs. McDonald's title remained, notwithstanding the removal to Kentucky, it was not, under the principles either of the Louisiana or the Kentucky law, and by the mere act

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of her husband, transferred to Basye, to whose purchase all the impairing circumstances just referred to were certainly applicable. Was her title then, divested by the compromise of her suit for a separation?

A woman, the owner of slaves, married in Louisiana, and was removed by her husband to Kentucky, where she sued for alimony, and the suit was compromised by the professed agents of the parties, and part of the slaves of the wife surrendered to the husband. Held that the wife's right to the slaves surrendered to the husband was not impaired by the compr'se. which was not made the decree of the Court.

Whatever might have been the effect of a decree embodying this compromise, (and even such a decree might have been set aside in equity, if fraudulently procured,) the agreement referred to derives no force or sanctity from having been made in relation to a judicial proceeding, or from having been filed among the papers of a pending suit. There never was any judicial action upon it. Nor does it appear to have produced any effect upon the conduct of the suit, at least none prejudicial to the rights of McDonald. It stands as a mere private agreement between husband and wife by their professed agents, relating to their mutual claims upon the property. As such it was liable to be impeached in the action of detinue as it is also in this suit, on the ground of the incompetency of Mrs. McDonald, or want of authority in her agent, or want of mutuality of obligation, or on the ground of fraud against her. Testing its efficacy by the facts and with a view to these objections we are of opinion that it must be regarded as wholly ineffectual both at law and in equity, to divest Mrs. McDonald of her title.

Mrs. McDonald's agent, though authorized to conduct the suit, had no authority to alienate her title to the property, nor did she ratify it.

1. There is no evidence of authority in the person professing to act as the agent of McDonald, except in the acquiescence of the principal in an arrangement by which two thirds of his wife's property was vested absolutely in him. 2. The agent of Mrs. McDonald, though authorized to conduct the suit, had at the time of the compromise, no color of authority to alienate her title; and although she afterwards made her mark to an instrument importing a ratification of what he had done in compromising the suit, there is, in the instrument executed by her, no specification of the terms of the compromise, and nothing to indicate that she was thereby deprived of all claim, future as well as present, upon the slaves which had been left in her husband's possession. Her inability to read writing, the tenacity with which, in her amended bills and affidavits, up to a period but little anterior to the execution of the first agreement of compromise, she main-

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tained her right to all the slaves; the fact that her husband and others, among whom was Beard, were not only resisting this claim, but attempting to defeat it by alienations of the property, immediately after the compromise and before the ratification, the obvious inequality and injustice of the arrangement, if the slaves all belonged to Mrs. McDonald, and the circumstance that while the agreement seems to make the compromise of the suit and the release of the seven slaves to Mrs. McDonald and a relinquishment by her of all claim upon the estate of McDonald prominent objects, stated in so many words; there are but few words not readily distinguished from the context, which import an absolute relinquishment of the slaves by her to McDonald; all these circumstances tend to raise at least a suspicion that the ratification executed by her after she had returned to Louisiana, may have been obtained without a proper representation of the real terms and intended effect of the agreement to which it relates. It does not appear by whom it was procured. Its execution may have been obtained by Beard or his agent in pursuance of his undertaking made only two or three weeks before, to attend to and settle the present compromise. It is not shown that the agent, whose acts it professes to ratify, ever received it, or acted under it. At any rate, he did not carry out the agreement which, but for this ratification, was wholly unauthorized, but without having it entered as the decree of the Court, caused the suit to be dismissed on his own motion. We should hesitate to pronounce this agreement and ratification effectual, even if Mrs. McDonald had been competent to make them so.

The interest of the wife in her dotal or separate property, cannot by the laws of Louisiana, be passed to the husband by a contract betw'n husband and wife without the sanction of the judge.

But supposing the agreement to have been executed by the husband and wife in person, then as a private agreement for the separation of the wife's property from that of the husband, before a final hearing of the suit, and without the sanction of the Judge, it was null and void, both as to themselves and as to strangers, by the denunciation of article 2,401 of the Louisiana code, if it is to be tested by that code. As an agreement between them for a division of the wife's property alone, before a legal separation of person or property, it comes within the spirit if not within the letter of the same denunciation. And in either of these aspects, it is denounced as void by the

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common law and by our law under which the husband and wife can make no valid contract directly between themselves, and no valid transfer of property directly from one to the other. There may indeed, be an exception in our law in the case of personal property held in trust for the sole and separate use of the wife, to which the phrase, separate property of the wife, is here applied. According to many, and perhaps the current of authorities, the wife, with respect to such property, is regarded in equity at least, as a *feme sole*. But the dotal property of the wife, under the laws of Louisiana, though called her separate property, stands on a different ground. It is not so denominated, because she retains the right of separate control and disposition notwithstanding the marriage. For until a legal separation of person or property, she has no such right under any article of the code which has been exhibited in the case. But on the contrary, the right of administering or managing the property of each, belongs, until separation, to the husband; and the wife's dotal property is called her separate property, to distinguish it from the common property, consisting of the gains or *acquets* made during the marriage, by the property and exertions of both; and because it was in fact her separate property, before and at the marriage, and by the law of Louisiana, continues to be her property, notwithstanding the marriage, subject, upon her petition, and for just cause, to be again restored to her separate control and disposition, by the decree of a Court, and subject, also, to be resumed by her, (perhaps under certain formalities,) upon the dissolution of the marriage, either by divorce or by the death of the husband.

A marriage in Louisiana where the right of the wife to her property is protected to her, is not lost by her removal by her husband with her property to Kentucky. After his death her right is clear to her dotal property as it existed at the marriage.

We are of opinion, therefore, that Mrs. McDonald was not divested of her title or interest in these slaves, either by the sale made of them by her husband, or by her own act in making or ratifying the compromise under which his sale is attempted to be sustained. And we are thus brought to the very important question, whether by the removal of McDonald and wife to Kentucky, the right of the latter to the slaves, which notwithstanding her marriage, continued, by the laws of Louisiana, to be her property, became under the operation of our laws,

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BEARD'S EX'R. vs BASYE.

absolutely lost to her and absolutely invested in her husband. It does not appear, and cannot be inferred, that at the time of the marriage Mrs. McDonald contemplated a removal to Kentucky, or consented to any modification of the marital rights, as regulated by the laws of Louisiana applicable to the case. If McDonald then intended a removal, with the purpose of thereby acquiring absolute dominion over the property of his wife, he intended and attempted to practice a fraud upon her, which ought not to be sanctioned, unless the law imperiously confirms the intended effect. It might not, perhaps, be difficult to draw this inference of original bad faith, from his subsequent conduct. But supposing the idea of removal and of asserting absolute dominion over the property, to have been afterwards conceived and matured, it was still a fraud of the most flagrant character, to use for such a purpose the power and influence and deceptious promises of a husband to induce the wife, in ignorance of the consequences, to consent to an act which might be, and was intended to be so fatal to her interests. If McDonald, when his wife after their removal, became dissatisfied and wished to return, had taken her and her property back to Louisiana, as he had promised to do, we suppose there can be little doubt that her condition and rights with respect to the property, would have been there considered as unaffected by the removal. If she had absolutely refused to accompany her husband, and he had brought the slaves to Kentucky without her consent, leaving her in Louisiana, would she not have retained her rights under the laws of the latter State, and might she not have asserted them in a tribunal of Kentucky, and with effect, unless against innocent purchasers even before, and most certainly after her husband's death? And has she lost her right, a vested right in existing property, by consenting to the removal of herself and property, under delusive promises, the fulfilment of which would have secured her right? She did in fact become dissatisfied soon after the removal to Kentucky. She manifested her desire to return, at least as early, and as she says, before the commencement of her suit for a divorce. Before its termination, she did in fact return to Louisiana, where she still remains, claim-

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ing a citizenship there. And upon the death of her husband, she instituted her remedies for the recovery of the slaves which he had sold. Did her consent to the removal, even if it proceeded merely from a sense of duty and conjugal affection, deprive her absolutely of her citizenship in Louisiana, and of all the rights secured to her by the laws of that State? Did the determination of her husband to remove, place her under the necessity of either surrendering her property by accompanying him, or of renouncing his authority and society, and appealing to the laws to prevent a removal of the property?

Most assuredly we should be quite certain that there is something in the laws or policy of Kentucky, deciding this question peremptorily and unequivocally in the affirmative, before we would be authorized to determine, that by the removal to Kentucky of a husband and wife with property which belonged to the wife at the place of their marriage and former residence, and until they entered Kentucky, the property became at once, either in virtue of her consent to the change of domicil, however obtained, or in virtue of the actual change, whether with or without her consent, absolutely lost to her, and absolutely transferred to her husband. For the principle which would place so unjust a power in the hands of the husband, and present to the wife so cruel an alternative, we are referred, not to any specific law or policy prohibiting the wife from having a separate interest or property in personalty or slaves, but to the general laws regulating the marital relation and rights, and to the general fact or principle, consequent upon those laws, that the wife does not and cannot hold in her own right, the absolute property in personal effects. Our law is, that the marriage is an absolute gift or transfer of all the personalty then belonging to the wife, and of all that is afterwards during the coverture transferred to her. What she has at the marriage, becomes by the marriage, the property of the husband, and what she acquires afterwards is also his by virtue of the marriage and the law. Our statute makes substantially the same regulation with regard to slaves, vesting such as belonged to the wife, at the marriage, in the husband, and also such as come to her dur-

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BEARD'S EX'R. vs BASYE.

ing the coverture, by descent, devise or otherwise. She cannot hold previous acquisitions, because by the marriage she or the law gives them to the husband, and for the same reason she cannot hold future acquisitions. And thus all personal property, whenever and however acquired by her at or during the marriage, is ordinarily embraced in the disability or prohibition, because ordinarily there can be no personal porperty owned or acquired by the wife to which this rule in one or the other of its branches will not apply.

But here is a case in which the question is not as to property acquired after the marriage and within this State, but as to property owned by the wife before the marriage, and which, notwithstanding the marriage, remained hers by the laws of the State in which she and her husband were married, and continued for some time to reside. Most certainly that part of the law of this State, which transfers the wife's property at the time of the marriage, to the husband, did not operate in this case, because neither the marriage, nor the parties, nor the property, were under the jurisdiction of this State, but were all within a State whose laws did not transfer the property to the husband, but preserved the right in the wife, notwithstanding the marriage. It is equally certain, that that principle of the law which vests in the husband the acquisitions of the wife, does not apply to these slaves, because they were neither acquired after the marriage, nor after the removal to this State, but belonged to her before marriage, and continued hers afterwards, until she and they came with her husband to this State. By what law then, is she to be divested of this vested right and ownership, and the slaves which were hers vested absolutely in her husband? Surely it will not do to say that, because women married and residing here, do not and cannot hold personal property, therefore a woman married elsewhere and allowed by the laws there to hold her property, shall, upon coming here with her husband, be deprived of all interest to it.

The laws of Louisiana may be consulted to ascertain and determine a right

The laws of Louisiana cannot, it is true, be brought here to create a right, nor to regulate the mode of its exercise or assertion, and certainly not to establish a right in contravention of our laws or policy, and to the injury

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of our citizens. But they may be brought here to establish or prove a right existing there while the parties and the subject were wholly within the jurisdiction of that State, and it is for the laws here to determine what modifications of right have been caused by the introduction of the parties and the subject within their jurisdiction. It is to be observed then, that the principle of our law which establishes the title of personal property in the husband in exclusion of the wife, and which prohibits or disables her from holding the title, relates to the title only, that is, the legal title or absolute ownership, and not to the beneficial interest in the use. The wife's legal title in personalty in possession, is *eo*-instanter, vested in the husband, and carries with it the beneficial interest and the right of absolute disposition, unless the beneficial interest has been distinctly separated or reserved, and the uses declared as a trust upon the title.

acquired under them, and will be applied in Ky. in determining those rights between husband and wife.

But such a separation of the beneficial use from the title, though in favor of the wife, and even to the exclusion of the husband, is not prohibited either by the letter or the policy of our laws. On the contrary, such provisions for the separate use of the wife, are frequent, and whether made at home or abroad, are uniformly sustained by our Courts, if made in good faith, and so manifested to the world by registration, as not to become the instrument of injury to others.

A separation of the legal title of slaves from the beneficial use even in favor of the wife, which exists in respect of property owned by the wife at the marriage, is not so far repugnant to the policy of Kentucky that the right of the wife cannot be protected here.

Under the operation of the principle that the legal title of the wife vests in the husband, but that a separate use or interest declared in her favor, may be valid and will be sustained, it has been decided that if a chattel be bequeathed to the wife in terms clearly indicating that she is to have a separate property or interest in it, the husband will take the legal title as trustee of the wife, and that the Court will, if necessary, appoint a trustee to secure her interest. It has also been decided that if a *feme* conveys her property before marriage, to a trustee for her own separate use, &c., free from her intended husband, the title will revert when the purposes of the trust are completely and certainly accomplished and at an end, and that she or her representatives may maintain an action at law upon it; and it is well settled that the purcha-

If chattels be bequeathed to the separate use of the wife, though the legal title vest in the husband, equity will regard him as trustee for the wife.—*Argu.*

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ser of trust property, with notice of the trust, acquires no better right than the trustee had.

Why then, and upon what principle of law or policy, we again ask, was Mrs. McDonald divested of all interest in these slaves by her removal with her husband into this State? Was she deprived of a vested right without contract, without fraud, and without crime, merely by subjecting herself and property to our laws? There was no conflict of laws in regard to the reservation to her of an interest in her property at the time of her marriage; and her removal to Kentucky certainly gave no retroactive operation to our laws, by which her interest was unsettled from the beginning. She came here unquestionably with a vested right and interest, and the question is as to the effect of our laws upon that interest. The broadest inhibition of our law declares at most, that she shall not or cannot hold the legal title for her own benefit. But there is no prohibition against the property being held either by her husband or another, in trust for her benefit. If then her pre-existing right was at all affected by her coming here, would it not be more consonant with justice and analogy to say, that it was modified rather than destroyed, and that if her husband became invested with the legal title by virtue of our laws, he took it in trust for the benefit of his wife, or the joint benefit of both? But even the laws of Louisiana, (in which perhaps the distinction between the legal and equitable title may be unknown,) are not necessarily to be understood as reserving to the wife what we would consider the legal title, since the administration and management, and ostensible control and possession would seem to be in the husband, until a separation takes place. If those laws had expressly declared that the husband should hold the dotal property of the wife, as trustee for the joint benefit, until separation of persons or property, on which it should revert absolutely to the wife, there would have been no conflict either between the laws of Louisiana and those of Kentucky, in their operation on the same subject, or between these latter laws and the right of Mrs. McDonald, as existing before she came to this State, and afterwards asserted here. If on the other hand, the laws of Louisi-

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ena had expressly declared that the legal title should remain in the wife, vesting the possession and control of the property in the husband for their joint benefit, then there would have been a conflict between her right to hold the legal title as reserved by the foreign law, and our law, which prohibits or prevents a wife from holding the legal title; and so far as the interest of our citizens, who might deal with the husband in the faith of his being the owner, might be injuriously affected by regarding her as the legal owner, it might be proper, to the extent of this conflict, and for the protection of our own citizens, so far to disregard the foreign law, and to consider our law as operating to transfer the legal title to the husband. But even this would not necessarily involve the destruction of the wife's interest, since the right to the beneficial use jointly or separately with her husband, might remain in her without a violation of our laws, and without injury to our citizens, of whom none would be affected by her interest but such as should have notice of it, and a few years might, as in other cases, subject the property absolutely, to the claims of her husband's creditors. The laws of Louisiana, so far as they are placed before us, make, (as has been stated,) no disposition of the legal title by name; neither do they denominate the husband a trustee. But if it were necessary for the preservation of the interest which they undoubtedly reserve to the wife, it might not be doing violence to them to consider them as making the husband, in fact, a trustee. We cannot, however, suppose that the question should or can be made to turn upon the admissibility or inadmissibility of such a construction, or upon the mere formal mode in which the right of the wife is reserved or secured by the law of her original domicil. The important matter is that, notwithstanding her marriage, a right in her property was reserved to her by the law of the matrimonial domicil, to become perfect upon separation, by death or otherwise, and that this right existed in full force up to her removal to Kentucky. Justice and policy, as well as comity, require that this right should be sustained as far as it can be done, without violating the laws or some stringent policy of our own State, or doing injustice to its citizens,

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BEARD'S EX'S. vs BASYE.

and we think these limitations are observed in saying that at most, our law operated to invest the husband with the legal title and use, until separation, or until the dissolution of the marriage by his death, when it reverted to the wife, except as to such property as he may have sold to a *bona fide* purchaser, not having notice of her title; and that as Basye purchased the slaves with a knowledge of her claim, she had a right to recover them from him in the action of detinue.

In coming to this conclusion, we have not thought it necessary to refer to the various and conflicting opinions which are copiously cited by Judge Story, in the sixth chapter of his work on the conflict of laws. It would be difficult indeed, to deduce, either from the conflicting authorities there referred to, or from the reasoning or any indication of opinion by the author himself, a satisfactory conclusion with regard to the law applicable to the question which we have been discussing. But in an extract from Burge's Commentaries on colonial and foreign laws, &c., contained in note 3 to section 187, (4) page 161, 2d edition, we understand the doctrine to be maintained, that independently of the theory of a tacit contract between the parties at the time of their marriage, adopting the law of the matrimonial domicil, (with regard to which there is much diversity of opinion,) that law should, in case of a subsequent change of domicil, regulate the rights of the parties in property held before the change. We confess, however, that after such examination and reflection as we have been able to bestow upon the subject, we find the general question involved in great uncertainty, and so far as opinions are concerned, in no little confusion. We, therefore, restrict the conclusion which has been stated, to the particular circumstances of this case, including not only those under which Mrs. McDonald was induced to come to Kentucky, and the pendency of her suit for a divorce and restoration of her property when Basye made his purchase, but also the fact that her husband removed shortly afterwards, to the State of Indiana, where he died, and that before his death she had returned, permanently, to Louisiana, and thus evin-

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ced, as soon as her disability was removed, her election never to have become a citizen of Kentucky.

Upon looking into the record of the action against Basye, we find the facts on which the plaintiff's right of recovery depended, substantially made out in proof. The defences which as Beard's executor now alledges, might and ought to have been made on the ground of the compromise, and the sale by McDonald, would have been unavailing. And as Beard's executor, though he had notice of the pendency of the action, (as Beard himself probably had in his lifetime,) did not come in aid of the defence, which he was bound to do by the covenant, we are of opinion that Basye was not bound to make an unavailing resistance; and that he has not lost his recourse, by failing to make defence further than to put the plaintiff on the proof of her title, and especially as his title might perhaps have been secured, if Beard had attended to the compromise, and had it made the decree of the Court. If there had been no compromise in the action of detinue, and the jury had found a verdict on their own consideration of the evidence, we should have regarded the judgment as evidence not only of eviction, but also of the paramount title of Mrs. McDonald. But the verdict having in effect been rendered by agreement of the counsel, on their judgment of the evidence, and under a compromise as to the amount of the recovery, we consider the judgment as evidence of eviction only, leaving the question of title to be contested and decided in this suit. Indeed it is not without some hesitation, that we have come to the conclusion that the judgment should even be deemed effective as evidence of actual eviction. It is only upon the ground that Beard's executor had notice of the action, and should have defended it, that the compromise by Basye can be at all justified, or that the judgment founded on it can be regarded as valid for any purpose against the executor.

Basye purchased the slaves with notice of Mrs. McDonald's claim, and he might not perhaps be entitled to recover on Beard's agreement to indemnify him, if there were ground for inferring that he was engaged in a fraudulent scheme for defeating her right. But he alledges that

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BEARD'S EX'R. vs BASYE.

he purchased in faith of the compromise, which Beard represented to be fair and valid, and which he undertook to attend to and settle, and this may be assumed to have been the case.

Beard covenanted to indemnify Basye against defects in the title to certain slaves which he purchased as the property of M'D. Basye was sued, of which Beard had notice, Basye was only bound to require of M'D. to make out his title, and Beard was bound by the decision.

We have had some difficulty in determining whether the value of the five slaves as assessed in the verdict and judgment against Basye, should form the criterion of his recovery upon the covenant of indemnity. The verdict having been founded on the agreement of the parties, is no evidence as against others, of the actual value of the five slaves at the time of its rendition. And as five only were recovered, the original price of the six in Basye's purchase, does not furnish a proper criterion of indemnity for the five. But he alledges, and there is no evidence to the contrary, that the value assessed was in fact less than the value which might have been proved, and there is enough besides in the case, to authorize the presumption that the five slaves recovered had increased in value after the date of Basye's purchase. If under the broad terms of Beard's covenant of indemnity, he was bound for the value of the slaves at the time of the loss, it should perhaps be assumed, upon the whole case, that the five which were recovered in the action of detinue, were not valued too high in the verdict.

If on the other hand, the price of the slaves in Basye's purchase from McDonald, should form the criterion of indemnity for the loss of any of them, then although it is evident that the price recovered by Mrs. McDonald did not in that purchase cost $1,900, which was the contract price of the six; yet as she had an action pending in the same Court for the sixth, against Basye's vendee, in which she had presumably the same right to recover as in the action against Basye for the five, and as the action for the sixth was in fact dismissed by her at the term succeeding that at which she recovered the five, it may be inferred that the compromise was intended to protect, not only the right of Basye to the five for which he was sued, but also that of his vendee to the sixth, for which an action was pending against him; that Basye, in effect, agreed to pay to Mrs. McDonald for all the slaves, the same price which he had agreed to pay her

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husband for them; and that to secure and effectuate this agreement, the contract price of the six was inserted in the verdict and judgment against Basye as the agreed value of the five. Upon this assumption, the only question is, whether upon ascertaining the superiority of Mrs. McDonald's title, which Beard had undertaken not merely to defeat, but by compromise to quiet, and in fact procure, and upon the failure of Beard and his executor, on notice, either to defend the suit or to procure or quiet the title, Basye might not, even without a judgment of eviction, procure her title himself, upon fair terms, and at the expense of Beard's estate, so far as Beard was bound by the covenant of indemnity. We think he had a right, under such circumstances, to bargain with Mrs. McDonald for her title, and to bind Beard's estate under the covenent of indemnity, at least to the extent of the original contract price. If, therefore, Basye had paid the whole price of the purchase from McDonald, it would have been proper to have decreed a restoration of the entire sum agreed to be paid to Mrs. McDonald, and secured by her judgment, of which satisfaction was acknowledged. But as a part of the original purchase money remains unpaid, and the notes for it have never been assigned for value, but are in the hands of the administrator of McDonald's legatee, (who is the same person as the executor of Beard,) the equity of the case is answered by cancelling these notes, or enjoining their collection, and restoring the money paid. The legatee of McDonald, who sold and either expressly or impliedly warranted the title of the slaves, has no equity either against Basye, to enforce these notes, or against Beard to throw the loss on him or his estate. If it be true, as suggested in argument, that it has been discovered since the rendition of the decree, that Basye in fact procured Mrs. McDonald's title for considerably less than $1,900, such a discovery can have no effect upon the question of reversal or affirmance, which must depend upon the record as it stood at the final hearing. How far it might be a ground for questioning or limiting the operation of the decree in some future proceeding, need not be determined.

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Owens, &c. vs Cowan's Heirs, &c.

With regard to the sum of $200, decreed on account of the fee paid by Basye to the attorney who defended the action of detinue, it is immaterial whether Beard was ever bound directly for it or not. There is no dispute that Bayse defended the action for some time, with vigor and at considerable expense and trouble, and that he had an attorney who attended to the defence. It is proved that the fee promised and afterwards paid by Basye, was $200, which is not shown to have been unreasonable. He, therefore, had a right to recover that sum; and as there is enough in the record to sustain the recital in the decree, that certain specified sums, part of the attached fund, had been paid over to Beard's executor, the decree is not erroneous in this respect, and is, therefore, in all its parts, affirmed.

Grigsby for plaintiff; *Hardin, McHenry and Morehead & Reed* for defendant.

Chancery.

Owens, &c. *vs* Cowan's Heirs; Beatty *vs* Same; Carneal *vs* Same.

Writs of Error to the Pulaski Circuit.

Sale of infants' real estate. Executors. Devisees. Vendor and vendee. Damages.

Case 42.

October 14. Judge Breck delivered the opinion of the Court.

Case stated.

In 1811, the last will and testament of Thomas Carneal, was admitted to record in the Franklin County Court. The testator, after devising specifically, a large portion of his estate, makes the following provision:

"The residue of my estate, consisting of lands in the States of Ohio and Kentucky, and all money bonds, I convey in trust, unto my friend and relative, Thomas Todd, for the express purpose of paying my debts, of every description, which I desire may be sold at such credit as he may judge right, between the creditors and the estate."

Thomas Todd and six other persons were appointed executors.

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At the same time the will was proved, Todd and all the other executors, by a writing under their hands and seals, renounced their right and refused to qualify as executors, or in any manner to take upon themselves the execution of the will. Todd also formally renounced, in open Court, the devise made to him in trust, for the payment of the testator's debts, and refused to accept the trust; and thereupon, administration, with the will annexed, was granted to James Coleman. The testator left three children, Thomas D. Carneal, S. H. Coleman, the wife of the administrator, Coleman, and Alice Carneal, who subsequently married James D. Breckinridge.

In 1813, William G. Cowan purchased from Thomas Bryan, representing himself as the agent of Carneal's heirs, 317 acres of land in the county of Pulaski, being part of a tract of 713 acres, patented in the name of the testator, Thomas Carneal. Bryan executed a bond to Cowan for a conveyance. Shortly afterwards, Coleman, the administrator, endorsed upon this bond that the consideration for the land had been all paid by Cowan, and bound himself to convey the same by general warranty deed, as soon as a proper survey was brought forward.

Cowan moved upon the land shortly after his purchase, and continued in possession thereof till his death, in 1835, and after his death, it remained in possession of his heirs till February, 1840, when, upon their petition, 206¼ acres thereof, the residue having been allotted to the widow as dower, was sold under a decree of the Pulaski Circuit Court, and John Owens became the purchaser thereof, and obtained the possession.

The object of the bill of Owens.

In June, 1841, Owens and his surety for the purchase money for the land, exhibited this bill, seeking to set aside the sale, upon the ground that it was irregular and void, that Cowan's heirs had no title to the land, and that one Beatty claimed and was in possession of a portion of it. They charge that the title was in Thomas D. Carneal, the only surviving heir of the patentee, Thomas Carneal, except as to the part claimed by Beatty. Owens also charges that the heirs of Cowan, well knowing the defects in their title, had fraudulently concealed them from him at the time of his purchase.

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OWENS, &c. to COWAN'S HEIRS, &c.

Answer of Cowan's heirs made cross bill against Carneal, &c.

Cowan's heirs answer, insist upon the validity of the sale under the decree, deny any fraudulent representations or concealment in regard to their title, and insist that the complainant, Owens, had long resided near the land, and knew all about the title. That he knew of the pretended claim to some part of it set up by Beatty. They pray that his claim may be quieted and if Beatty is ascertained to be in possession of any portion of the 206¼ acres, that he may be decreed to surrender it. They make their answer a cross bill and make Thomas D. Carneal, &c. defendants. They alledge the sale to their ancestor by Coleman, as administrator with the will annexed of Thomas Carneal; that the sale was made for the payment of Carneal's debts; that the purchase money was all paid immediately after the purchase, and they exhibit a deed from Coleman, as administrator with the will annexed, of Thomas Carneal, but made subsequent to the exhibition of complainant's bill. They pray a conveyance from T. D. Carneal, if necessary to perfect their title, and rely upon the length of possession by them and their ancestor.

Th. D. Carneal's answer and cross bill against Cowan's heirs.

Carneal answers and resists the claim set up by Cowan's heirs, denies that Coleman, as administrator with the will annexed, had any authority to sell the land to Cowan, or that Bryan had any authority. He states that shortly after the probate of the will of his father and before the purchase of Cowan, he transferred to Coleman all his interest in the estate, with some exceptions. That subsequently his sisters both departed this life, his sister Coleman leaving an infant son, who also died while an infant. That his sister Breckinridge died without issue, and that he thus became the sole surviving heir of his father. That Cowan's heirs, if entitled to any interest in the land in contest, were only entitled to one third absolutely or in fee, and to an estate during the life of Coleman, in another third. He insists that Cowan and his heirs had been tenants in common with him, and should account for rents and profits, and makes his answer a cross bill, and prays a division of the land, &c. He also avers that in 1815, Coleman was removed as administrator, and that he was himself appointed.

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Owens, &c. vs Cowan's Heirs, &c.

Beatty claims a portion of the land in contest, under Carneal's title, and relies upon a Sheriff's sale, in virtue of an execution against Th. D. Carneal.

Decree of the Circuit Court.

The Court below dismissed the complainant's bill, so far as he sought a rescision of his contract of purchase, and dissolved the injunctions, which had been awarded him, restraining the collection of the purchase money. The heirs of Cowan were decreed to convey to him, by deed with general warranty; and Beatty, by quit claim as to the supposed interference between the tract claimed by him and the Cowan tract, and a *habere facias* is directed to be issued upon the application of the complainant, to enable him to obtain possession of the small portion thereof in the actual possession of Beatty.

The cross bill of Carneal is dismissed at his cost.

To reverse this decree writs of error are severally prosecuted by Owens, Carneal and Beatty, and Cowan's heirs assign cross errors.

In the revision of the case the objections made to the decretal sale, under which Owens purchased, will be first noticed.

Five of the heirs who petitioned for a sale, were infants, and petitioned by their statutory guardians; J. W. Hargrave and Sarah Cowan were guardians jointly, for three of the infants. It is objected that Hargrave only made affidavit to the petition, though the other guardian *united* in it; affidavits were made by the guardians of the other two.

Two guardians of infants uniting in a petition for the sale of infant's estate, and one swearing to the petition, is a substantial compliance with the statute.

The objection is very clearly not available, even if there had been no affidavit by either of the guardians, as all parties, in answer to the complainant's bill, confirm the sale and pray that it may be enforced, and it appearing for the interest of the infants that it should be, the Chancellor, on that account, as has been decided by this Court in analogous cases, would not disturb it. But both guardians uniting in the petition, and the affidavit by one, we think, was a substantial compliance with the requisitions of the statute.

The sale of infant's real estate is not invalid because the guar-

2d. It is objected that no bond was executed by the guardians, either prior or subsequent to the sale. But the Court required the commissioner appointed to make

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Owens, &c. vs Gowan's Heirs, &c.

dian did not execute bond as prescribed by the statute before the decree or sale if the fund was still in the power of the Chancellor. He should secure the fund to the ward by appropriate bond before suffering it to pass into the hands of the guardian.

the sale, to execute bond with security, before he proceeded to act under the decree, and in a sufficient penalty for the protection of all the heirs. The bonds for the purchase money were directed to be taken payable to the commissioner. Besides, when the complainant exhibited his bill, the petition case was within the power of the Chancellor, and for aught that appears in the record, may be so still. It was in the power of the Chancellor, before permitting the proceeds of the sale to go into the hands of the guardians, to require from them sufficient bonds for the additional protection of their wards. And such bonds, it may be presumed, would have been required.

The failure to require bonds from the guardians, did not affect the jurisdiction of the Court, nor, as the whole case and the proceeds of the sale were still within the control of the Court, did it oppose any obstacle to the confirmation of the sale, or constitute a sufficient reason for avoiding it by the complainant. Some other objections questioning the correctness and regularity of the proceedings and the validity of the sale, are urged, but they are deemed untenable and need not be noticed.

When a devise is made of lands to a trustee to pay debts, &c. and he refuses to accept the trust, the title devolves upon the heirs of the devisor, subject to the debts, &c. (3 *Dana*, 185.)

The objections to the title present more difficulty. It is evident that the heirs, at the exhibition of the complainant's bill, were not vested with the legal title to the land, but we are inclined to the opinion they had a valid and perfect equity. By Todd's renunciation of the devise to him, and his refusal to accept the trust, the title vested in the heirs, charged, however, with the payment of the testator's debts: *Helm, &c.* vs *Darby's administrator*, (3 *Dana*, 185.)

The 44th section of the act of 1797, (1 *Stat. Laws*, 666,) provides, that "the sale and conveyance of lands devised to be sold, shall be made by the executors, or such of them as shall undertake the execution of the will, if no other person be thereby appointed for that purpose; or, if the person so appointed shall refuse to perform the trust, or die before he shall have completed it."

And where land is devised to ex'r. in trust to be

Upon the refusal of Todd to perform the trust, the power to sell devolved upon the executors. But as they all refused to qualify, the administrator, with the will an-

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nexed, under the act of 1810–11, (1 *Stat. Laws*, 671,) was vested with the power. If the sale made to Cowan was made by Coleman as administrator, and we think it may be so considered, it was a valid sale. He received the purchase money, and covenanted to make the conveyance. He proves that it was necessary to sell the land for the payment of the testator's debts, and that he sold it as administrator.

sold to pay debts, and the trustee refuses to execute the trust, the admr'r with the will annexed may sell under the authority of the act of 1810, (1 *St. Law*, 671.)

He moreover proves, that Bryan, in making the sale, acted as his agent, and that he, Coleman, received the purchase money, and confirmed it. While Coleman was administrator, a conveyance by him as such, would have passed the legal title; but after his removal, we are not satisfied that he would still be authorized to convey.

The conveyance of an administrator with the will annexed, made after he is superceded by another adm'r. passes no title except such as he may have independently of his character as administrator.

The deed, therefore, made by him to Cowan's heirs since the commencement of this suit, would only convey such title as he held or could convey, irrespective of his character as administrator. Upon the hypothesis, that by the renunciation of the devise to Todd, and his refusal to accept the trust, the title vested in the heirs, the deed from Thomas D. Carneal, made in 1811, vested in Coleman the title to one undivided third part of the land in contest. He was also entitled to an estate during his life, to another third, in right of his wife, by the courtesy. Upon her death, her title to one third, subject to the courtesy, descended to her son, who dying while an infant, the title passed to Thomas D. Carneal and Mrs. Breckinridge. And upon the death of Mrs. Breckinridge without issue, her title vested in Thomas D. Carneal, who thus became invested with the title as to two thirds, subject to the life estate in Coleman as to one third.

The chancery proceeding in 1815, by which Todd was decreed to convey, and did convey to Th. D. Carneal all the title and interest, if any, which was vested in him by the will, was unnecessary, and nothing passed by it. The title was previously vested in the heirs. Nor can the agreement among the heirs to renounce the will and hold by descent, have any bearing upon this controversy.

So far as the title was in Carneal, it was held in trust for Cowan and his heirs. It did not enure to the benefit of Coleman in virtue of Carneal's conveyance to him in

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OWENS, &c. vs COWAN'S HEIRS, &c.

1811. By that deed, he transferred the interest only which he then possessed. It had no reference to, and would not pass the subsequently accruing title and interest.

It results from this view of the case, that the Court below erred in not decreeing Carneal to convey to Cowan's heirs whatever title might be vested in him, in the tract purchased by their ancestor from Coleman, or Bryan as his agent, or at least to convey to Owens to the extent of the 206¼ acres. Cowan's heirs held under Carneal's title, by an executory contract, and Owens had a right to require that he should be vested with the legal title. The necessary parties were before the Court, and the title should have been perfected accordingly. It also results that the cross bill of Carneal was properly dismissed.

The allegation by the complainant, of a fraudulent concealment by the adult heirs, of the nature and condition of their title, is denied, and not sustained by the proof. Their ancestor had been in possession of the land at the time of the sale, claiming it as his own, near thirty years. It had been twenty years, or very nearly, since Thomas D. Carneal had instituted an ejectment for the recovery of the land, and had failed in the effort and abandoned it. Under such circumstances, the heirs might well suppose their title valid.

As to the claim of Beatty, it is in proof that Owens had resided near the land, and knew all about it, and that really the only question was in regard to the actual boundary of the Cowan tract.

Can lands devised for the payment of debts be sold under execution or judgment against the heir?—QR. See *Helm* vs *Darby*, (3 *Dana*, 185.)

Beatty claims under a Sheriff's sale, made in virtue of an execution against Thomas D. Carneal, as trustee, administrator with the will annexed, and only surviving heir of Thomas Carneal, deceased. It is questionable whether the land, charged as it was with the payment of the debts of the testator, was subject to execution, and whether any thing passed by the sale. According to the principle settled in *Helm and Darby's administrator*, *supra*, the land was equitable assets in the hands of the administrator, and not subject to be sold under execution. But waiving that question, it is manifest from the Sheriff's deed, and from the testimony, that the land sold by

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the Sheriff, and embraced in his deed, was not intended to constitute, and does not constitute any part of the 317 acres purchased by Cowan. The boundary in the deed is to run "with the line of a survey of three hundred and seventeen acres, sold to William G. Cowan, and whereon the said Cowan now (then) resides; thence with the line of Cowan's survey to the beginning." These lines of Cowan are satisfactorily established, and as established, Owens gets his 206¼ acres. It is true Beatty claims to run within Cowan's lines as established, and it appears he has in actual possession, within the lines of Cowan, at one corner, a small piece of about an acre, which had been previously in possesion of Cowan. We are of opinion the decree is right in requiring Beatty to release to Owens any claim or title he may have to any portion of the land purchased by Owens, as it clearly appears, as we have seen, that the tract so purchased by him is all within the well established lines of Cowan's survey of the 317 acres, made long before the sale under execution. The decree in that respect, would have been right, even if it were conceded that the Carneal title passed by the Sheriff's deed to the portion of the Cowan tract, as claimed by Beatty. Cowan, as has been shown, had the elder and superior equity, and he was in actual possession, claiming up to the extent of his lines at the time of the Sheriff's sale. The purchaser, therefore, had notice of Cowan's equity, and if he acquired the title of Carneal to any portion of Cowan's tract, in equity he would be bound to surrender it. Beatty occupies no better attitude than Goggin, who was the purchaser at the Sheriff's sale. We are inclined, also, to the opinion, that the Chancellor was right in requiring Beatty to surrender to Owens the small field in his possession, and therefore, that there is no error in the decree, which he can render available.

Where a vendee files his bill alledging a defect of title in vendor and the title be perfected after the filing the bill or obtained by cross bills in the same suit, no

Finally, we come to the conclusion that the Court was right in sustaining the sale made to Owens, but erred in not requiring Carneal to release his title. The cross error of Cowan's heirs, that the complainant's injunction should have been dissolved with damages, and his bill dismissed with cost, is not available.

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CANAL COMPANY vs COMMONWEALTH

damages should be awarded.

So far as the decree dismisses the cross bill of Carneal, it is affirmed, and it is also affirmed upon the writ of error prosecuted by Beatty. Upon the writ of error prosecuted by Owens, &c., it is reversed for the error indicated, and the cause remanded for further decree, consistent with this opinion.

B. & A. Monroe and Goodloe for Owens, &c.; *Harlan & Craddock and Fox* for Cowan's heirs *et al.*

MOTION.

Louisville and Portland Canal Company *vs* Commonwealth.

Case 43.

APPEAL FROM THE JEFFERSON COUNTY COURT.

Taxation. Valuation.

October 17.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

THE tax commissioner of one of the districts in Louisville, in 1845, valued and assessed one hundred acres of land owned by the Louisville and Portland Canal Company, with the improvements thereon, including the canal, at one million of dollars. An appeal was taken from the assessment, by the company, to the County Court, under the last clause of the statute of 1819, (2 *Stat. Laws*, 1376,) and a motion made to reduce the valuation to one hundred thousand dollars. The motion failed by a division of the Court, and the company have appealed to this Court.

In ascertaining the tax to be imposed upon the Louisville and Portland Canal Company under the Statute of 1819, (2 *Statute Laws*, 1376,) the canal, and all locks, dams, bridges and houses should be valued.

The proof shows clearly, that if the canal be embraced and estimated in the valuation, that the amount will at least equal, if not exceed the value found by the commissioner. That the cut or canal, together with all locks, dams, bridges, and houses, should be taken into the estimate in fixing the value, we cannot doubt.

The 7th section of the statute of 1831, (2 *Stat. Laws*, 1385.) provides, "that each person listing lands or town lots for taxation, as now directed by law, shall also add to said list, the *value* of said lands or town lots, *considered in their improved state*, and including *all* their *improvements thereon*, attached to the freehold, of *any kind*

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or description." The language of the statute is broad enough, and was no doubt intended by the Legislature to embrace any and every kind of addition or melioration which may be made to or upon lands or town lots, for the use or enjoyment of man, or the issues or profits arising from the same. All such improvements add to the value of the freehold, and should be estimated in the valuation of the same for taxation. And whether such lands, with their improvements, belong to an individual or a corporation, they are equally subject to taxation according to their increased value.

The right of taxation is a sovereign right, and is not to be considered as waived as to the property of a corporation unless expressly waived, though the shareholders may reside out of the State where the corporate property is situated.

Had the land through which the canal has been excavated, been owned by an individual, with capital sufficient to make the canal, locks, &c., there could be no doubt that he would have had the right to do so, and to exact tolls at his discretion, from all those who might choose to use the same in avoiding the dangers of the falls. And if so, he surely would be subject to taxation on the property thus increased in value by the improvements and consequent increase in value, by reason of the issues and profits springing out of the same. If so, we can see no good reason why a corporation owning the same property, should not be subject to taxation in the same manner and at the same valuation, as if owned by an individual. The charter contains no restriction on the right of taxation, which is a sovereign right, and should never be regarded as surrendered, limited or restricted in the grant of a charter or creation of a corporation, unless there be express terms of surrender, limitation or restriction. The property of the corporation lies in the State, and is protected by the laws of the State, and may be taxed here whether the shareholder live here or elsewhere, as the real estate, with the improvements of individuals lying here may be taxed, whether the owners live here or elsewhere.

The imposition of a State tax upon the property of a corporation, is no violation of the contract or privilege given by the charter, unless the right to tax be ex-

Nor can the assessment of taxes on real estate acquired under the authority of a charter, as others are taxed, there being no surrender of the right of taxation, be regarded as an infraction of the charter or a violation of that provision of the constitution which prohibits the impairment of the obligation of contracts, any more than

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PEARCE'S HEIRS vs PATTON *et al.*

pressly surrendered by the charter.

the assessment of taxes upon land which has been granted to an individual, can be regarded as an infringement of the grant or a violation of the article of the constitution referred to.

The grant is as absolute and unconditional as the charter. Neither contains a reservation of the right to tax the estate granted or acquired, but neither contains a *stipulation* surrendering or restricting the exercise of the right, and it is as fallacious to contend in the one case as in the other, without such stipulation, that the exercise of the power is an infringement of the charter or grant, or an infraction of the provision of the constitution alluded to.

The judgment of the County Court is, therefore, affirmed.

Duncan for appellants; *Cates, Attorney General and Loughborough* for Commonwealth.

CHANCERY.

Pearce's Heirs *vs* Patton, *et al.*

Case 44.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Limitations. Retrospective laws. Unconstitutional enactments. Private rights. Obligation of contracts.

October 19.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

THIS is a controversy about a lot of ground in the city of Louisville. George Walls devised the lot in question to his daughter, Elizabeth Patton, the wife of Samuel Patton. In 1797, Samuel Patton, by deed prepared in the name of himself and wife, conveyed the lot to Sarah Elliott, and the deed, upon his acknowledgment alone, was duly recorded. In 1806, the deed was presented to his wife, they then being residents of Hardin county, and signed and sealed by her, and on privy examination before two Justices of the Peace, acknowledged and certified by them, and their certificate recorded in due time, under the deed of her husband before spread on the record, and the name and seal of Mrs. Patton attached, under his name, to the record of his deed; but the deed, after being thus executed by Mrs.

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Patton, was not recorded, nor was there any *dedimus potestatem* directed to the Justices, authorizing them to take the acknowledgment of the *feme*. Mrs. Patton died in 1822, her husband surviving, who died in July, 1837. In February, 1838, Thomas W. Patton, their only son and heir, instituted an action of ejectment for the lot, against Gray and wife, who were in possession, claiming the same by sundry derivative conveyances from Sarah Elliott, to whom his father had conveyed, and his mother attempted to do so as before shown, and recovered a judgment for the lot. From that judgment an appeal was taken to this Court and the judgment affirmed, as will be seen by reference to the case reported in 2 *B. Monroe*, 12. Upon the return of the cause to the lower Court, Pearce's heirs, whose ancestor had sold and warranted the title of the lot to Ormsby, under whom Gray and wife claimed, filed their bill under the 11th section of the act of 1831, (1 *Stat. Laws*, 450,) against Thomas W. Patton and others, asking a confirmation of the deed of his mother and a release and surrender of his title, alledging that they had paid and satisfied to Gray and wife, the consideration of Ormsby's purchase from their ancestor. The Circuit Court, upon the hearing, dismissed their bill, and they have appealed to this Court.

The case involves the construction of the 11th sec. of the statute of 1831, (1 *St. Law*, 463) concerning conveyances.

Waiving the question raised as to the sufficiency of the certificate of the Justices, of the privy examination and acknowledgment of the wife, and due execution and record of the deed, and all other questions as to defects in the same, except the single defect of a want of *dedimus potestatem*, authorizing the Justices to examine the wife and take her acknowledgment, duly returned and recorded, and the question involves directly, the construction of the 11th section of the statute of 1831, *supra*, which never before, that we are aware of, has received the construction of this Court, as applicable to such a state of case.

The provisions and proviso of of the 11th sec. examined.

That section provides, "that in *all cases* where a deed of conveyance *has* been heretofore made by a *baron* and *feme*, and the same has been duly executed, but with this defect only, that a *dedimus potestatem* did not issue in the first instance, authorizing the Justices to take the

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PEARCE'S HEIRS vs PATTON et al.

privy examination, that the *grantor* or those claiming the land under such deed, may exhibit a bill in chancery, at any time after the first day of January, 1838, in the Court of the Circuit where the land may be situated, and upon full and satisfactory proof being made, that such deed has been executed by *baron* and *feme*, *without fraud or guile*, and that there has been *seven years peaceable*, *continued*, and *uninterrupted possession* under such deed, since the passage of this act, and that the only defect is the want of a *dedimus potestatem*, to take the acknowledgment and make the privy examination, to decree a confirmation of such deed, and to make such other order as may be necessary to perfect the title: Provided, however, that so much of this act as authorizes suits against *femes covert*, to obtain a due execution of deeds made without a *dedimus potestatem*, or for any defect in taking the privy examination, shall not be so construed as to apply to any case where a *feme* has commenced suit to recover *her estate* or *dower* in lands, or *where such suit shall be commenced within the term of seven years aforesaid, next after the passage of this act.*"

It is apparent that this section is very unskilfully drafted and if construed according to the literal import of the language used, in several places, the obvious purpose of the Legislature, in its enactment, would be perverted, and the section rendered, in many respects, an absurdity.

The *grantor* is authorized to file the bill, which if taken literally, would authorize the husband to file a bill against his wife for confirming his own deed. The *grantee* was obviously intended, instead of the grantor. Again, the section authorizes a bill to be filed at any time after the *first day of January*, 1838, when the proviso saves the right to the *feme* to sue for the land, at any time within *seven years* from the *passage* of the act, and it passed on the *fifteenth of January*, 1831, of course the seven years would not expire until the fifteenth of January, 1838, fifteen days after the time fixed for filing the bill.

In the same manner, we must conclude was the terms *femes covert* inadvertantly used in the proviso, for *femes*. The draftsman having his mind fixed on the condition of the wife, at the time when the conveyance was made as

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feme covert, fell into the error of using the term *feme covert*, instead of *feme*, in the proviso. To contend that *feme covert* was meant, is to impute to the Legislature the gross and palpable injustice, of tantalizing the *feme* with a right to sue within seven years, "to recover her estate," when there was no mode known to our laws, nor any provided by the statute, by which she as a *feme covert* could sue during the life of her husband, as she had no right of entry, nor could her heir sue, after her death, during the life of his father, he being tenant by the courtesy, and having passed all his interest to the grantee.

Nor could it be called *her* estate properly, or at any rate, *her* estate for which she could sue during the life of the husband, but the estate of the grantee of the husband. And the fact of calling it *her* estate, and for which she might *sue* at any time within seven years from the passage of the act, clearly shows that the Legislature looked to, and intended only to provide for a case, where the husband was dead, and the wife was entitled to the estate, and had at the passage of the law, a right of entry and of suit for the recovery of the same. Besides, the section provides for relief only in a case where the grantee had remained in the peaceable and *uninterrupted possession for seven years;* where the possession during the life of the husband could not be held otherwise than *peaceable* and *uninterrupted*, against any assertion of right by the wife or her heir, which shows that the section was intended to apply to a case, where the peaceable possession might be disturbed at any time during the seven years, by the suit of the wife or her heir, but not being disturbed, they were to be barred of their remedy.

It may also be observed, that there is no saving in the proviso, in favor of the right of suit on the part of the *heir* of the *feme*, if she be dead, yet the gross injustice of excluding the heir from the right to sue for his inheritance within the time secured to his mother, could never have been intended or contemplated by the Legislature, and such construction as would imply it, should never be given to the section.

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PEARCE'S HEIRS
vs
PATTON *et al.*

The construction to be given to the 11th section.

Correcting the inaccuracies and inadvertancies referred to, in the language and frame of the section, and giving a consistant effect to all its provisions, we understand, it with the proviso, as applyingonly to cases where deeds had been made by *femes covert*, in conjunction with the husband, without a *dedimus potestatem*, *before* the passage of the act, and the wife's right of entry, or that of her heir, *had accrued before* that time, by the death of the husband or otherwise, and that in such cases, and such only, if she or her heir failed to sue for seven years from the passage of the act, her or his remedy was intended to be barred, and the title confirmed in the grantee, or others who might have been *peaceably possessed* of the land under such defective conveyance for seven years, provided it could be shown that the deed was made without *fraud* or *guile*. The section thus construed, was intended to operate as a conditional act of limitation; the right to the benefit of the bar being made to depend upon and only available to the grantee or his vendee, upon the condition of his showing that the deed was obtained *without fraud* or *guile*. The fact that the limitation was not intended to be general, or to apply to all cases indiscriminately where the *feme* had conveyed, but only to cases in which it could be shown that the conveyance was made *fairly and without fraud* or *guile*, may have been the reason for not allowing the bar to be pleaded at law, as in other cases, but of giving the jurisdiction to a Court of Chancery over the subject, as the most appropriate tribunal to inquire into and determine the fraud or guile, the want of which was made the condition upon which alone the right to the benefit of the bar was made to depend.

As a prospective act of limitation the 11th section of the statute of 1831 was within the power of the Legislature, tested by either the State or Federal constitutions, so far as it limits the time of bringing suits by *femes covert* where the right of equity existed.

As a prospective act of limitation, general or conditional, though made to retroact upon executed contracts or conveyances previously made, we have no doubt that the section was within the constitutional competency of the Legislature, whether tested by the State or Federal Constitution. The wife or her heirs having a right of entry, and reasonable time, seven years, allowed to sue, if she or they failed to avail themselves of the remedy, they might justly be regarded, for the peace of society, as surrendering their title, or abandoning their contract.

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This being the legitimate construction to be given to the section, it at once appears that it does not apply to the case before the Court, as Mrs. Patton was dead before the statute was enacted, and her heir, Thos. W. Patton, the defendant, had no right of entry or of suit, at or before its passage, nor till within about six months before the expiration of the seven years allowed for bringing suit, his father having died only about that length of time before the termination of the period limited.

It does not apply to cases where no right of action in the *feme* or her *heirs*.

We are the more disposed to give to the section the construction which we have given to it, inasmuch as a different construction, or a construction which makes it apply to, and take away the fee of the wife or her heir, upon the impossible condition of their failure to sue within seven years, when their hands were tied, and they, or either of them had no right of entry or of suit, by the existing laws, and none was provided by the section, would not only be grossly unjust, but a palpable invasion of private right secured to the citizen by the constitution of Kentucky, and we think also by the constitution of the United States.

The 12th section of the 10th art. of constitution of Kentucky, and application to this case stated.

That section of the constitution of Kentucky, which provides: "Nor shall any man's property be taken or applied to public use, without just compensation being previously made to him," has been construed by this Court, and properly, to inhibit the invasion of, or the taking of private property, for *any purpose*, or under and pretext whatever, except for public use, and for that only, upon affording previous just compensation to the owner. This provision of the constitution affords a shield to private right, and should be so construed, against any enactment of the Legislature, direct or indirect. It would be a poor protection to the right of the citizen, to hold and enjoy unmolested, his private property, if the Legislature could take it away and vest it in another, in *presenti or in futuro*, by imposing terms and conditions upon his right to hold it, which is impossible for him to perform; as by requiring him to sue within a specified time, when there is no remedy afforded or mode prescribed by the law by which he can sue. If even any terms could be imposed, which would embarrass his right, or obstruct his full en-

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PEARCE'S HEIRS vs PATTON *et al.*

joyment of his estate, indirect invasions of private property, should never be countenanced, as it is easy to frame pretexts, dictated by apparent policy and personal hardship at the time, to evade and fritter down the protection intended to be afforded. Nor can the fact that Patton had the right to sue for six months before the termination of the time limited, by the unforeseen and accidental death of his father, make any difference. Six months is not the time prescribed for the suit, but seven years, and if it was, we should hardly regard it as a *reasonable* time, to be constitutionally available, to bar the remedy as a mere act of limitation. Nor can it make any difference that the Legislature has made a Court of chancery the instrument to divest the right of the heir. If the Legislature had not the power to do it, neither could they delegate the power to do it, to any other body, judicial or executive.

If the Legislature had not the power to pass a retrospective act of limitation, it had no right to confer on the Court of Chancery the right to apply such a principle.

We also incline strongly to believe, that the section, if construed as contended for, would be an infraction of that provision of the constitution of the United States, which prohibits the enactment of any law impairing the obligation of contracts.

That part of the constitution of the U. S. prohibiting the passage of laws impairing the obligation of contracts applies as well to executed as executory contracts.

It is well established that this provision of the constitution applies as well to executed as executory contracts. Mrs. Patton, and her heir after her death, held the fee simple title to the lot in question, under the grant from the Commonwealth and the several mesne conveyances down to her. That title she or her heir has never forfeited nor parted with, by any contract binding in law or equity. The deed relied on as her deed, is a nullity, and has no more legal effect or operation in passing her title, in law or equity, than if the conveyance had been acknowledged before John Doe or Richard Roe, or any other private person, or if it had never been acknowledged at all, or privy examination made. It amounts to no more than an *attempt* to make a contract or conveyance, which has no legal or equitable force or validity, and notwithstanding which, the wife and her heir after her, held the fee simple title in remainder, after the death of her husband, as fully and effectually as if no such attempt to convey had been made. If the section in question

The 11th section of the statute of 1831, (1 *St. Law* 450,) so far as it authorizes a Court of Chancery to confirm title in a vendee of a *feme covert* who has conveyed by deed which was ineffectual when made, impairs the obligation of contracts and is in violation of the constitution of the U. S. (1 *Sec. Art.* 10.)

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takes away the right and vests it in another, does it not impair those contracts of conveyance from the Commonwealth down to her and her heir, under which they held, and had a right to hold the lot in question? But for the section the title of the heir is unquestionable. If it be divested, by what power has it been divested, by the act of the mother or by the act of the Legislature? If by the act of the Legislature, their act divests a vested right in the heir, and not only impairs but destroys the obligatory force of the contracts of conveyance down from the Commonwealth to the heir, under which he had the right to hold the lot, and repose in safety in its full enjoyment.

Decisions of Pennsylv'a. disapproved.

We are aware that the Courts of Pennsylvania have established a different doctrine in relation to the subject before us, from the doctrine here avowed, and have even gone much further than we are required to go, in sustaining legislative enactments, in giving validity to void and invalid contracts. But we never can bring ourselves to sanction the doctrine there established.

Decisions of Ohio approved.

The Supreme Court of Ohio, in the case of the *lessee of Christian Good* vs *Elizabeth Zercher*, (12 *Ohio Rep.* 364,) had the subject under consideration, in a case very analogous to the one before us, and have established a different doctrine from that sustained in Pennsylvania, and one, as we conceive, much better calculated to preserve and sustain the inviolability of private rights against legislative interference.

Saterlee vs *Matthewson*, (2 *Pet.* 412,) cited, but not approved in extenso. A statute which takes from one man property & gives it to another impairs the validity of the contract by which the property was held. The Court concur in the main with Justice Johnson in his dissent from the majority of the Court.

Nor can we yield our sanction to the doctrine avowed by the majority of the Supreme Court of the United States, in the case of *Saterlee* vs *Matthewson*, (2 *Peters' Rep.* 412,) in its application to this case. Though it may be true that a law which gives validity to a void contract, cannot be said to impair the obligation of *that* contract, yet it seems to us that a law which gives force and efficacy to a contract which was a nullity, or which was no contract before, but a mere unauthorized attempt to make a contract, by which the fee is taken from one person and transferred to another, as effectually impairs, nay uproots and destroys the obligation of the contracts under which the title was held, as if those contracts. by a direct act of legislation. had been declared nullities, or the title

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PEARCE'S HEIRS
vs
PATTON *et al.*

wrested from the holder and given to another without such pretext, or reclaimed by the Commonwealth.

As Justice Johnson, in the case of Saterlee, *supra*, with whose opinion, in the main, we concur, justly remarks, "What boots it, that I am protected by that constitution from having the obligation of my contract violated, if the legislative power can *create a contract* for me, or render *binding* upon me, a contract which was null and void in its creation. To give efficacy to a *void* contract is not, it is true, *violating* a contract, but it is doing infinitely worse, it is advancing to the very extreme of that class of arbitrary and despotic acts, which bear upon individual rights and liabilities, and against the whole of which, the constitution most clearly intended to interpose a protection commensurate with the evil." And after giving his views of the ground upon which the decision of the State Court might be supported, he remarks, "the decision of the State Court is supported under this view of the subject, without resorting to the portentous doctrine, (for I must call it portentous,) that a State may declare a void deed valid as affecting individual litigants, on a point of right, without violating the constitution of the United States. If so, why not create a deed or destroy the operation of a limitation act after it has vested a title."

We also concur with him in opinion, that it was an unfortunate opinion in the Supreme Court originally, by which the words "*ex post facto*," in the constitution of the United States, was confined to penal cases only, and agree with him in a note appended to his opinion, that if that construction is to stand, (and it has been too long settled and acted upon now to be disturbed,) a construction should, by intendment, be given to the next clause inhibiting the impairment of the obligation of contracts, which would afford that protection to private rights, springing out of, or dependant upon contract, against re-troactive legislation, which was contemplated by the framers of that instrument.

Upon the whole, we are perfectly satisfied that the complainants were not entitled to the relief which they asked. The decree of the Chancellor dismissing their bill is, therefore, affirmed.

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Pirtle for appellants; *C. A. Wickliffe and Ballard* for appellees.

Clemens *vs* Caldwell.

CHANCERY.

ERROR TO THE MERCER CIRCUIT.

Case 45.

Trusts and trustees. Administrator. Interest. Jurisdiction.

JUDGE BRECK delivered the opinion of the Court.

October 19.

THOMAS CLEMENS, by his last will, which was admitted to record in the Mercer County Court, in 1826, devised one third of his estate to the children of his sister, Elizabeth Caldwell, then the wife of Charles Caldwell, and directed that it should be converted by the trustee therein named, into cash and vested in good United States government stock, and the interest arising therefrom to be also invested in the like stock, until the children of said Elizabeth should attain the age of twenty one years, when the whole amount, principal and interest, was to be equally divided between them; but he adds: "in case the said Elizabeth shall die without *heirs*, then this one third part of my estate, which I now give to her children, shall descend to any other lawful heirs." The will in conclusion contains this clause: "I do hereby appoint my uncle, James Clemens, of Huntsville, Alabama, and his successor or successors, as trustee or trustees, for the execution of this will."

Case stated.

James Clemens, the trustee named in the will, having renounced his right and refused to qualify as executor, James Clemens, Jr., was appointed administrator with the will annexed, and as such, executed bond, with James Clemens, Sr. and Isabella Clemens his sureties.

In 1837, Jeremiah Clemens Caldwell, by his father and next friend, exhibited this bill in the Mercer Circuit Court, alledging that he was the only child of Elizabeth Caldwell, and as such, under the will of Thomas Clemens, was entitled to one third of his estate. That James Clemens, Sr., had not accepted the trust for the manage-

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CLEMENS vs CALDWELL.

ment of the complainant's interest, and was not disposed so to do, and James Clemens, Jr., resided in St. Louis, Missouri; that he had rendered no account of the estate to which the complainant was entitled, which had come to his hands; nor how it had been invested or used; that complainant resided with his father in the county of Mercer, and that it would be for his interest to have some other person appointed a trustee for the management of the fund pursuant to the directions of the will, and that an account should be rendered by the said James Clemens, Jr., of the estate of the testator, &c. The said James Clemens, Sr. and the said James, Jr., and Thomas Reed and his wife, Isabella, late Isabella Clemens, were made defendants.

Interlocutory decree of the Circuit Court.

In March, 1838, the Court appointed Charles Caldwell, the father of the complainant, trustee, requiring him to execute bond with surety, in the penalty of twenty thousand dollars, conditioned that he should "faithfully collect, dispose of, and account for the estate of the complainant, so far as it might come to his hands, under such orders, directions and instructions as may hereafter be made upon him by the Mercer Circuit Court, in this cause." As to the residue of the cause, the Court retained it for further proceedings and decree.

First answer of James Clemens, Jr.

In 1840, James Clemens, Jr. filed his answer, admitting that the complainant was entitled to a portion of the estate of Thomas Clemens, in his hands, as claimed, and he expresses a willingness to settle it up. His answer, however, is very indefinite and unsatisfactory as to its amount and condition. He admits he has made no settlement as administrator, and that he has not invested that portion of the estate to which complainant is entitled.

Amended bill.

Subsequently amended bills were filed, alledging more specifically, the amount of the testator's estate, which had been converted into money by the administrator, and charging him with having used it, and profitably, for himself, in the very extensive and valuable business in which he was engaged.

Second answer of J. Clemens, Jr.

In 1843, the defendant further answers, and for the first time questions the jurisdiction of the Court and the

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right of complainant to maintain his action. His answer is still evasive and unsatisfactory as to the amount and condition of the fund in question.

Second amended bill.

A subsequent amended or supplemental bill was filed by complainant, alledging that his father, Charles Caldwell, who had been appointed trustee, had accepted the trust and executed bond as required by the decree. He further alledges the continued and profitable use, in his own business, by the defendant, the administrator, of the estate of the testator, or the portion to which the complainant was entitled, and that he still failed to render any account thereof; and by specific allegation and interrogatory, he calls upon him for further answer.

Third answer of J. Clemens, Jr.

The defendant in his answer states that the estate of the testator amounted to twenty two thousand and fifty four dollars 68 cents. He admits that he had on hand of this sum, in cash, as early as the 1st January, 1828, twelve thousand four hundred and six dollars 15 cents; and that in 1839, he received between two and three thousand more. As to the residue of the estate, the answer is still not satisfactory. He again admits that complainant is entitled to one third of said estate. He does not deny the repeated allegation as to the profitable use of the fund in his own business. What or how great profits he has made, he does not attempt to explain.

Decree of the Circuit Court.

The cause was heard in part, and the Court recognising and confirming the appointment of Charles Caldwell as trustee, decreed that the defendant, the administrator and his sureties, pay to the said trustee, one third of the $12,406 15, on hand the 1st January, 1828, with compound interest at the rate of six per cent. per annum, up to the rendition of the decree, amounting to $11,509 38, and that the trustee might have execution therefor, &c. And as to the residue of the cause, it was retained, and an auditor appointed to settle the account of the administrator, &c.

To reverse that decree, James Clemens, Jr. prosecutes this writ of error.

The questions raised by the assignment of errors are, first, that the Court below had no jurisdiction.

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CLEMENS vs CALDWELL.

An administrator with the will annexed, becomes a trustee in the place of an executor refusing to qualify, and is responsible as such, and amenable to the jurisdiction of the Chancellor who may remove him as trustee of a devise, and appoint another.

This objection, we think, is untenable. Whether Jas. Clemens, Jr. is regarded as occupying the attitude in regard to the fund in question, of a trustee under the will, for the investment and management thereof as therein directed, as contended by his counsel, or whether he should be regarded merely as an administrator, and that the duty of investing and managing the complainant's portion of the estate did not devolve upon him, in either case, we think the jurisdiction of the Court was unquestionable. If he was not trustee, upon the failure of the one appointed, it was proper, and was the peculiar province of the Chancellor to appoint another, and place the trust funds in his hands. If on the other hand, the trust devolved upon the defendant, as administrator with the will annexed, as we think it did, and as insisted by his counsel, it was the province of the Chancellor, upon the application of the complainant, to require him to show and exhibit the amount and condition of the trust fund, and upon his failure to execute the trust, as required by the will, or from the insecurity of the fund in his hands, or other sufficient cause, to appoint another person trustee. In the appointment of the father of the complainant trustee, in this case, it seems to us that there was no abuse of discretion by the Chancellor.

The failure of a trustee to invest the fund as directed, and the use thereof in his own business, is good ground for his removal by the Chancellor.

The failure of the defendant to invest the fund, as required by the will, his utter neglect in rendering an account of his trusteeship, his abuse of the trust in using the fund in his own business, and his evasive and unsatisfactory answers when called to account for it, and the way he had managed it, fully justified the Court in substituting another trustee, to which the defendant made no objection in the Court below, but recognised the appointment as made. Nor does it appear that the appointment was not in all respects proper and judicious.

The effect of removal of one trustee and the appointment of another, is not to change the purposes of the trust, but for its security to the *cestui que trust*,

The effect of appointing a trustee, and placing the trust fund in his hands, was not, as contended by counsel, to confer upon the complainant any additional right to it. It would be held by the trustee as held by the administrator, subject to the provision in the will. Whether Elizabeth Caldwell is still living or not, does not appear. If she is not, the fund is vested absolutely in the complain-

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ant. If she is still living, his right to it, or to any portion of it, may depend upon his surviving her. The Chancellor in this view of the case, very properly retains in the decree, entire control over the fund, and to render such control efficient, has required from the trustee a bond conditioned accordingly. The objection, therefore, to the jurisdiction, and to the appointment of a trustee, is not deemed available.

and it is still within the power of the Chancellor.

It is further objected, that the appointment of the trustee in 1838, was a final disposition of the case. We think not. *That* was only one of the objects sought to be obtained by the bill, and the Chancellor might well proceed to compel the administrator to settle up the estate, and place the trust fund in the hands of the trustee. Nor under the circumstances of this case, was it erroneous to direct the admitted liquidated portion of the fund to be paid over before the whole estate was finally settled, and more especially as the record contains manifest indications of a disposition on the part of the administrator to delay the final settlement of the matter.

The removal of one trustee, and the appointment of another on bill filed for that purpose, is not a final disposition of the case. The Chancellor may retain the case, and compel an account with the newly appointed trustee of the trust fund.

But again, it is insisted that it was erroneous to charge the administrator with interest annually compounded, and that in any view of the case, the decree is for too much.

In the consideration of this question it may be assumed that the duty of executing the will in regard to the devise to the children of Mrs. Caldwell, devolved upon the administrator with the will annexed, and in reference to that devise, that he occupied the attitude of a trustee under the will. The will directs one third of the testator's estate to be converted into cash as soon after his decease as the trustee shall think most fit, and to be invested in good United States government stock, and the interest arising therefrom to be invested in like stock. It was manifestly, therefore, the intention of the testator that this trust fund, as well the accruing interest as the principal, should be made productive; and if found impracticable to invest it in the specific stock, as directed by the will, it was the duty of the trustee, we apprehend, otherwise to have invested it, so as to have effected the intention of the testator, as far as practicable, in refer-

A trustee who fails to invest a trust fund in stock, with the interest also, as directed, but employs it in his own business, is responsible for interest upon the annually accruing interest, if an investment was practicable directed, if not, then for such interest as it would have produced in the hands of a man of ordinary prudence.

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CLEMENS vs CALDWELL.

ence to its accumulation. If the fund could have been invested as directed by the testator, and the trustee had failed to make the investment without showing sufficient reason for such failure, the rule is well settled that he should be held responsible for such accumulations as would have resulted from a specific investment as directed: *Levin on Trusts and Trustees*, (*Law Library*, 329 *to* 332; 2 *Story's Equity*, 642.)

Whether it was practicable in this case to have invested the fund according to the testator's injunction, does not appear. The trustee offers no excuse for having failed so to invest it. He renders no account as to the accumulations of it, but admits, by failing to respond to the explicit and repeated allegations in the complainants bills, that he has used it for his own benefit, and profitably, in the very extensive and lucrative business in which he had been engaged. How profitable he has rendered the fund thus employed by him, he has not condescended to explain. He does not intimate that there was any difficulty or hazard in loaning or investing the fund, so as to secure an annual return of six per cent. He suggests no misfortune nor loss in his business, nor any circumstance, nor is there any thing in the record which commends him, in settling the question of interest, to the indulgent consideration of the Chancellor. On the contrary we think he should be held to a strict accountability.

Even if it were conceded that the fund could not have been invested as directed by the will, still we can hardly doubt that it would have been the duty of the defendant to have loaned it, as a man of ordinary prudence would have done, so as to realize an annual return of the interest. If he has failed so to loan it, and offers no excuse for not so doing, but has used it, as he virtually admits, profitably in his own business, he is to be considered as having loaned it to himself upon the same terms, upon which it may be fairly inferred it could have been loaned to others.

There is no uniform rule for fixing the rests and calculating interest against

There is no fixed rule as to what would be a reasonable period for compounding the interest upon funds in the hands of executors and other fiduciaries, in view of their accountability, and which it was their duty to invest or

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loan, and render productive by the accumulation of interest. The length of the *rest* would depend upon the particular facts and circumstances of the case. In *Moore's executor* vs *Beauchamp*, (5 *Dana*, 71,) and where the subject is very fully examined and the authorities cited, this Court fixed the two first rests at three years each, and after that at two years. But that case differed from the one before us in several important particulars. There were circumstances which entitled the executor, in that case, to the favorable consideration of the Chancellor in designating the rests, but none are perceived in this. Finally we are of opinion that the Court below was right in subjecting the administrator to annual compound of the interest.

executors and other fiduciaries. The right of rests should depend upon the facts and circumstances of each case.

There is another objection not expressly raised by the assignment of errors, but relied upon in argument, which it remains to notice. It is objected that no refunding bond was required from the complainant or trustee, before he was authorized to enforce the decree against the defendants. We are not satisfied that this objection would have been available, even if it had been expressly assigned for error. When the case was heard nearly twenty years had elapsed since the probate of the will. The bill alledges that the testator was not in debt at his death, and there is no intimation, from any quarter, that such was the fact. Besides, there was still left in the hands of the administrator, as admitted in his answer, of this trust fund, without reference to interest, between three and four thousand dollars. Under such circumstances, we think, the failure to require a refunding bond can in no view of the case, be regarded as an error to the prejudice of the administrator.

The presumption is strong, after a lapse of twenty years, that the debts against a decedent's estate have been all paid.—*Argu.*

Wherefore, the decree is affirmed.

Morehead & Reed and Harlan & Craddock for plaintiff; *Woolley* for defendants.

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CHANCERY.

Case 46.

Hiatt's Heirs *vs* Calloway's Heirs.

APPEAL FROM THE GARRARD CIRCUIT.

Jurisdiction. Mistakes.

October 21. CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated. A judgment in ejectment was recovered for 100 acres of land, by the heirs of Peter and Susannah Calloway, claiming title under their mother, against Hiatt's heirs, upon the ground that their mother, who had owned the same, had not, by any valid conveyance upon privy examination, duly certified and recorded, parted with her title in her lifetime. The heirs of Hiatt filed their bill in chancery, enjoining the judgment, praying a confirmation and surrender of the title, and that they may be quieted in their possession, upon allegations that a deed of conveyance had been duly and properly executed by the joint conveyance of the father and mother of the heirs of Calloway, upon the privy examination of their mother, by two Justices of the Peace of Missouri, acting under a commission properly issued, from the County Court of Garrard, where the land lies, and the same, together with the certificates and dedimus, was transmitted to, and recorded in the proper county, except that the Clerk, in recording the certificate of privy examination of the wife, had made a *mistake* and recorded it as of the 5th day of October, 1823, instead of the 5th day of October, 1822, its true date, and the date of the acknowledgment of the husband, made before the same Justices, and duly certified by them. And if they cannot obtain a correction of the mistake, they pray a confirmation of their title under the 11th section of the act of 1831, (1 *Stat. Laws*, 453,) and conclude by a general prayer for relief.

The construction of the 11th sec. of the statute of 1831, as applicable to this case. The complainants are not entitled to relief under the section of the statute relied on, as has been just decided by this Court in the case of *Pearce's heirs* vs *Patton et al.* It appearing that their mother was covert at the passage

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The mistake of a clerk in his certificate of the time of recording a deed of conveyance clearly appearing by record evidence, may be corrected by the Chancellor.

of the statute, and continued so until 1834, when their father died, the section does not apply to the case.

But it appears that Peter Calloway, in 1818, sold and conveyed the land in question, which belonged to his wife, to John Hiatt, the ancestor of the complainants, for eight hundred dollars, which was paid to him. That in 1821 a *dedimus potestatem* was properly issued, directed to two named Justices of the Peace of Madison county Missouri, requiring them to take the privy examination of the wife, to a deed of conveyance stated to be attached to the commission, from Peter Calloway and Susannah, his wife, for the hundred acres of land in question, to the heirs of John Hiatt, deceased, naming them in the commission. That said commission was presented to the two Justices named, and on the 5th day of October, 1822, they certify the signing and acknowledgment of the husband endorsed on the deed, filled up as of the same date, over their signatures and seals as Justices, and certify in like manner, the signing, privy examination and acknowledgment of the wife, in due form, endorsed on the commission, which they certify as attached to the deed acknowledged, and the deed attached to the commission, with the certificates endorsed, was sent to the Clerk's office of the proper county, and recorded in due time, to-wit, on the 25th of October, 1822, together with the certificates of the Justices and commission, but the certificate of the Justices of the wife's privy examination and acknowledgment, is, through the obvious mistake of the Clerk, recorded as of the 5th of October, 1823, instead of the 5th of October, 1822, which postpones the date of privy examination and acknowledgment to a time beyond that within which the deed, under the statutes as heretofore construed by this Court, should have been spread on the record.

The certificate recorded is in every respect, *verbatem* with the certificate endorsed, except as to the date so; are the certificate of the acknowledgment of the husband, the commission attached, and deed recorded *verbatem*, the same as the originals, which were produced to the Chancellor below, and is also produced to this Court. And it is perfectly obvious from an inspection of the originals

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Hiatt's Heirs vs Calloway's H's.

and a comparison of the same with those on record, that the true date of the privy examination and acknowledgment of the wife, was the 5th of October, 1822, the same date of the deed and the same date of the acknowledgment of the husband, and that the whole difficulty and embarrassment of the complainants' title has been produced alone by the error and mistake of the Clerk. The question arises, cannot a Court of equity take cognizance of the case to correct the mistake, or relieve the complainants from its consequences? We think it can. The parties have done all that was necessary on their part, to pass a perfect fee simple title to the grantees, and have deposited all the papers necessary to be recorded, in due and proper time, in the proper office for record, with the officer provided by law, for spreading the same on the record. He has recorded the same, but by inadvertency and mistake, and without fault on the part of the grantees or grantors, he has attached a *wrong date* to one of the certificates, by which the title of the complainants has been so embarrassed, that a judgment at law in ejectment, has been recovered against them. The interferance of the Chancellor is obvious on two grounds:

The Chancellor may relieve against mistakes.

1st. It is peculiarly the province of the Court to correct *mistakes*, and one of the principal grounds of its jurisdiction.

The Chancellor has jurisdiction, on bill filed by one in possession, to quiet the title to lands so possessed.

2d. The complainants are in possession, and have a right to resort to a Court of Equity to quiet their title, and secure them in the peaceable enjoyment of their purchase.

Where a deed of conveyance was regularly acknowledged in due time by *husband* and *feme*, and deposited for record,—but the Clerk in his certificate of the time of recording, committed an error, such mistake was corrected by the Chancellor, on bill filed by the grantee in the deed, not by changing the record.

If it were conceded, which we are not prepared to do, that to pass effectually the fee of the wife, the deed, with the certificates and commission, should not only be deposited for record in due time, but should also be recorded, yet as in this case, all were duly recorded, which the statute requires, *verbatem et literatem*, with the originals, except as to the single mistake alluded to, we cannot concede that the *error* of the *clerk* shall have the vitiating effect of forfeiting the title of the complainants, so that relief cannot be afforded against its consequences, by the powers of a Court of Chancery. To allow the heirs to take advantage of this clerical mistake, would be a species of *bad faith*, which a court of conscience would

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never tolerate, and the more especially, as the mistake is such as might even in a judicial record, after the term, be corrected as a clerical error. It is true, the Chancellor cannot go into the County Court Clerk's Office, and alter or change the record so as to make the deed and certificates stand on the record as they should have been originally recorded; but he can act on the parties as he is accustomed to act on the parties to a common law judgment, by injunction and attachment, to compel them to do what is conscientious and right.

cord, but by operating upon the person of the grantor and compelling a release of title.

The two Justices who are to take the privy examination of the wife, may also take the acknowledgment of the husband, and their certificates and seals are sufficient to authorize the admission of the deed to record, without any other or further authentication.

We are also satisfied that the commission was sufficiently descriptive of the conveyance, to which the acknowledgment and privy examination was to be taken. Though it described a deed as having *been executed* by the husband and wife, the deed is attached to the commission, and is otherwise identified as the deed intended, and though drawn out in form, was no doubt filled up as to the date, and was in fact, as certified, signed and sealed by the husband and wife, on the day of its date. The description of the deed as an executed deed, cannot vitiate the commission, or mislead the Justices or parties as to the deed intended, and the more especially as the deed could not have been *executed* by the wife in any other manner than by privy examination, to obtain which was the object of the commission.

Upon the whole, we are satisfied that the complainants are entitled to relief. The decree of the Chancellor is therefore reversed, and cause remanded, that their injunction against the judgment at law may be perpetuated, and that as the means of effectually securing the title to them, and quieting them in the possession against all casualties which might by any possibility accrue, by the loss or destruction of the original deed and certificates, that the defendants, the heirs of Susannah Calloway, their mother, may be decreed to convey, release and confirm, all claim to the land to the complainants, and pay

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Crawford's Heirs vs Logan.

the costs of the proceedings. And the appellants are entitled to their costs in this Court.

McKee and Dunlap for appellants; *Turner and Bradley* for appellees.

Motion.

Case 47.

Crawford's Heirs *vs* Logan.

Error to the Garrard Circuit.

Bonds for costs. Counter Security.

October 20.

Judge Marshall delivered the opinion of the Court.

Case stated.

In this action of ejectment, on the demise of Crawford's heirs against Logan, a rule, on motion of Ephraim and E. B. Smith, was made against the plaintiffs, that they should give counter security herein, on or before the calling of the cause at the next succeeding term, otherwise the suit to be dismissed. And the record of the succeeding term says: "The parties came by their attornies, and the plaintiff having failed to comply with the order of this Court entered at the last term, requiring counter security to bear Ephraim and E. B. Smith harmless in the payment of such costs and damages as might be awarded to the defendant, and of the fees which might become due to the officers of this Court; on motion of the defendant's attorney, ordered that said rule be made absolute, that the suit be dismissed without prejudice, &c., and the costs were adjudged accordingly.

Security for costs can only be required of non resident plaintiffs, or in ejectment the lessors of the plaintiff, and the defendant is the proper person to demand it.

The Smiths were neither plaintiffs nor defendants, nor tenants in possession. Their interferance in the suit, is based upon the assumption, that they as sureties of the plaintiff, or of the lessors, had executed a bond for costs, &c. It is in that character that they obtained the rule. It appears, however, in point of fact, that although such bonds may have been executed in other actions brought by the same plaintiff, in the same Court, no bond was executed in this case. Nor is there any order requiring the execution of such a bond in this case. It is only in the recitals in the bonds executed in the other cases, that we find evidence of the non-residency of the lessors, or of

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any fact upon which the requisition of a bond for costs might be made. And we are not satisfied that these other bonds which have been brought up, not in the record of this case, but in the distinct records of the cases to which they belong, can be regarded as composing a part of the present case for any purpose whatever.

In strictness, then, there was not only no ground for the proceeding in behalf of the Smiths, who had no connection with the case, but there was no ground apparent in the record for requiring bond and security for costs, even on motion of the defendant. Nor, although the fact of non-residency of the lessors, and the right of the defendant to have security for costs be understood to have been conceded does it appear that any motion requiring such security was ever made by the defendant. It is to be inferred from the bill of exceptions, that the counsel for the defendant who moved to make the rule absolute, was also counsel for the Smiths as parties to the rule. And even if this attempt to enforce the rule be regarded as the motion of the defendant, still it was but a motion to enforce a rule for which there was no plausible foundation, and to which he was no party, and he could not, by his interferance, impart force and validity to it. He had no right to insist upon a dismissal as the consequence of non-compliance with a void rule. He could, in fact, occupy no other attitude in the enforcement of that rule, than the Smiths' themselves could occupy. The failure to give counter security when there was in fact no security to be indemnified, could not, in any possible view of the case, be a ground for dismissing the suit.

But if the interposition of the defendant to enforce the rule, could be regarded as a motion on his part, to dismiss the suit, because bond for costs had not been given, and if it be assumed that there was in the case sufficient ground for requiring such bond, still as the defendant could take no advantage of the failure to comply with the improvident rule which had been obtained by the Smiths, and as this motion would have been the first movement on his part towards requiring security for the costs, it would have been proper, in conformity with the general practice, and especially in view of the request

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and offers of the plaintiff's counsel, to give time for procuring security and executing the bond. So that even in this aspect of the case, the dismissal of the suit at once, on motion of the defendant, and because a bond, which he had never required, had not been given, must be deemed to have been erroneous.

Can one who is surety for costs require of his principal, security to indemnify him in any case?—Qu.

We are not, however, to be understood as intimating that a security in a non-resident's bond for the costs of suit, has a right, as a matter of course, to obtain such a rule as was granted in this case, and to have the suit dismissed upon the plaintiff's failing to give him counter security. The present case does not call for a decision of this question. But we may remark that if in any case, such a security can be relieved by the dismissal of the suit, we should suppose that the circumstances must be extraordinary, involving fraud or imposition or the like. The security in the bond for costs has in general, no more right as such, to interfere with the suit for the benefit of the defendant, than the defendant has to interfere between the plaintiff and his security for the benefit of the latter.

Wherefore, the order dismissing the suit and the judgment for costs against the plaintiffs, are reversed, and the cause is remanded for further proceedings.

Bradley for plaintiffs; *Turner and Kinkead* for defendant.

CHANCERY.

Case 48.

Williams *vs* Halbert, &c.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Equity and equitable jurisdiction. Interpleader.

October 21.

JUDGE MARSHALL delivered the opinion of the Court.

The Chancellor will not entertain a bill at the instance of a lessee, to compel the lessor and a claimant to the leasehold premises to litigate the right to the pre-

THE complainant, Levi, comes into a Court of equity with a bad grace, and in a very questionable attitude. There is no little ground for the suspicion that he obtained the lease from Williams and took the possession under her, with the intention of betraying her interest to the antagonist claimant, A. G. Halbert. If this was not so, it is certain that he took the lease and the possession

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with full knowledge of the nature, both of her claim and of that of Halbert, and with a knowledge also, that the latter was employing other means than the legal remedy for ousting Williams and obtaining the possession. And it is scarcely doubtful that since Levi got the possession and in filing this bill, he has been acting in aid of the claim and designs of Halbert. He does not, therefore, occupy the attitude which would properly entitle him to call upon Williams and Halbert to interplead in equity; and it is even questionable whether the Chancellor should so far interpose as to protect him by injunction or otherwise, against the loss which in consequence of the alledged insolvency of Williams, he might incur in case he should be compelled to pay the stipulated rent to her. Since whatever hazard there may be of being compelled to pay it again to Halbert, he has incurred it with his eyes fully open, and perhaps in bad faith towards Williams; and since there may be some ground for the inference that Halbert, even if he should recover the possession, will not subject him to such loss.

misses and rent, especially where there are strong circumstances inducing the belief that the lessee obtained the possession for the benefit of the claimant, to the prejudice of the lessors.

Passing then to Halbert, who has made his answer a cross bill against Williams, we are of opinion that he also stands in a position which does not entitle him to the favorable regard, and certainly not to the active interposition, of the Chancellor in aid of his claim.

Nor will the Chancellor entertain, in such case, a cross bill of the claimant, to try in chancery a purely legal right to the premises, which is properly tenable at law.

In the first place, he stands subject to the strong suspicion of having colluded with Levi, the tenant of Williams, to obtain the possession of the premises. He is charged with such collusion in the answer of Williams to the original bill, which, although it is not made a cross bill against him, he assumes to be so and answers as if it were, but does not deny this charge. This implied admission, though it may not amount, technically, to proof, tends with other circumstances in the case, to authorize the inference that he, with others, had combined in an effort to deprive Williams of the benefit of the written transfer or gift of the leasehold premises in question, which had been made to her by M. Halbert, on dissolving the illicit connection which had existed between them for six years.

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WILLIAMS vs HALBERT, &c.

And in the second place, M. Halbert having confessed a judgment to Heth and Halbert, who, with a full knowledge of the circumstances relating to the title or claim of Williams, had their execution levied on the interest of M. Halbert in said leasehold premises, then in possession of Williams. A. G. Halbert, with the same knowledge, and perhaps as their agent, purchased under the execution, and at the price of $20, which he was not required to pay, the interest of M. Halbert in a lease of more than four years duration, of which the annual value was one hundred dollars. It is apparent that if he acquired any present interest in the lease by his purchase, it was a legal interest enforcible at law, and which does not require the aid of a Court of equity. Nor is any special reason shown why the legal question whether he did acquire a present interest and right of possession should be brought into a Court of equity, or why that Court should be called upon to change the possession under a purely legal claim. But it is manifest that Heth and Halbert, the plaintiffs in the execution, and A. G. Halbert, the purchaser under it, regarded the claim of Williams under the transfer from M. Halbert, as presenting no obstacle to the legal remedy against the premises; and as in consequence of the incumbrance having been thus disregarded, and of the question of its validity as against the creditors of M. Halbert not having been brought before a Court of equity in the first instance, so that there might have been a fair sale of an ascertained interest, the purchaser, if he acquired a present interest in the lease, and not the mere reversion after the expiration of the time for which it was transferred to Williams, has acquired it at an enormous sacrifice, for one twentieth of its value, the great inequality, if not iniquity of the transaction, furnishes a positive reason against the interposition of a Court of equity in aid of such a speculation; and especially when, as in the present case, there is nothing either in the nature of the question or of the proof, which requires the aid of that Court. If Halbert is entitled to the possession, his remedy is complete at law. His bill is in effect nothing more than an ejectment in chancery. Being out of possession and with the legal title, if he has any, he has no

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right to ask the Chancellor to ascertain and enforce his right; and although much latitude is allowed to a defendant who is brought into the Court against his will, Halbert can claim no privilege on this ground as against a stranger, or even a co-defendant who has been improperly brought into the Court, and probably by his own collusion with the complainant. If a tenant has, in any case, a right to bring his landlord and an opposing claimant into a Court of equity to contest their respective claims to the possession and to the rent, Levi, as already stated, has not shown himself to be thus entitled. The question between the opposing claimants does not, therefore, come properly into the case, in virtue of any privilege which the complainant has, of bringing them in, nor with a view to his benefit or his right. And as Halbert has shown no ground, (on his own account,) for litigating his claim in equity, nor for obtaining relief there, his cross bill should have been dismissed without prejudice, and he should have been left to the assertion of his legal right, if he has it, in the legal forum.

What disposition then should be made of the original bill, is the only remaining question. If the alledged insolvency of Williams were established, and if there were a reasonable certainty or strong probability that Levi would be subjected to loss by the establishment of the claim of A. G. Halbert, and if, notwithstanding the inference or suspicion of collusion between Levi and Halbert, the Court might interpose to save the former from the impending loss, still it is clear that indemnity is all that he could ask, and that would be sufficiently secured by retaining the injunction until Williams should furnish the indemnity, or by directing the rents to be paid into Court, subject to be withdrawn by Williams on the like condition. But the alledged insolvency is denied and not proved; no legal proceeding had been instituted or threatened by Halbert for the recovery of the possession of the premises, nor is it averred that his claim will be asserted at law, and if asserted, it is by no means certain that it will be there established, for any thing but M. Halbert's reversionary interest in the lease after the expiration of the six years for which he transferred it to Wil-

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WILLIAMS vs. HALBERT, &c.

liams. And besides this, Levi comes into Court asking protection against a danger of which he was fully aware before he assumed the relation of tenant, and he comes in under strong suspicion of collusion with the antagonist claimant, and this suspicion tends also to show that there is in fact, no danger of loss to him, whatever may be the true merits or ultimate success of the opposing claims. We are of opinion, therefore, that he has no equity to be relieved upon the case made out, and that his bill also, should have been dismissed. Our conclusions with regard to the merits and proper disposition of each of the bills would be the same, whether the transfer from M. Halbert to Williams be regarded as a pure gift or as a transfer upon valuable consideration. And as they are founded upon the opinion that the case presents no ground for bringing the question as to the validity or effect of that transfer into a Court of equity, we of course do not decide, and are to be understood as not intimating an opinion upon this point; nor do we undertake to give construction to the instrument relied on as a transfer. Its uncertainties and incongruities can operate to the prejudice of the transferree only, and she seeks no aid from the Court in reference to it.

Wherefore, the decree directing the rent to be paid and the possession to be delivered to Halbert, is reversed, and the cause remanded, with directions to dismiss the cross bill of Halbert without prejudice and at his costs, and also to dismiss with costs, the original bill of the complainant, Levi.

Pilcher & Hauser for plaintiff; *Thruston and Pope* for defendants.

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Marr *vs* Smith.

ASSUMPSIT.

APPEAL FROM THE HICKMAN CIRCUIT. *Case* 49.

Assignor and assignee. Consideration. Diligence.

JUDGE BIXOR delivered the opinion of the Court. *October* 21.

THIS was an action of assumpsit, brought by Smith against Marr, as the assignor of three notes to Smith, and which, as he alledges, after using due diligence, he has been unable to collect. Smith obtained a judgment for four thousand five hundred and four dollars 50 cents, the amount of the assigned notes, interest and costs, and Marr has appealed to this Court. Case stated.

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The declaration contained various counts, to which the defendant filed demurrers, and a plea of non-assumpsit. The demurrers were all overruled, and we are not satisfied that the Court erred in thus disposing of them.

The main questions presented upon the merits for consideration, are:

1st. Whether the assignments of the notes by Marr were made upon a sufficient consideration to render him in any event responsible.

2d. If the consideration for the assignments should be deemed sufficient, whether Smith has used such diligence for the collection of the notes from the obligor, as entitle him to a recovery.

The first question arises upon the following state of fact, or upon testimony conducing to establish it:

Smith being the holder of claims upon Lansdale & Co. and Belknap, &c., who had been engaged in business in the county of Hickman, and with the settlement of whose affairs Lansdale seems to have been charged, sent his agent to that county to procure payment or other satisfactory arrangement. Lansdale owning a house and lot in Mills' Point, offered the same in payment of the claims. This offer was declined, but it was proposed, if Lansdale would sell the property upon a credit of one, two, three and four years, and obtain notes therefor, with good se- Facts appearing in proof.

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MARR vs SMITH.

curity, that the notes to that extent, would be received in discharge of the claims. The property was accordingly sold to one Farmer, who executed his four several notes to the defendant, Marr, payable annually in four years, for $1,250 each, and these notes were endorsed or assigned by him to the plaintiff, Smith. The notes were all drawn, endorsed and delivered at the same time, and the testimony conduces to prove that all this was done with the knowledge and consent of Marr, and that the notes were received in discharge of Smith's claims upon Lansdale, upon the faith of the endorsements by Marr, which purport to have been for value received. Marr appears to have objected to becoming bound upon the face of the notes, but agreed that they should be made payable to him, and that he would endorse them. Under these circumstances, the notes were received by Smith in discharge of his claims upon Lansdale & Co.

The surrender of a claim to a debtor by a creditor, is a good consideration for an assignment of a note, whether the surrender be to the assignor or to a third person.

In view of these facts, the position contended for by consel, that the endorsements thus made by Marr, were without consideration, and imposed upon him no liability, cannot, in our opinion, be sustained. It was not essential to his liability, that any consideration should have passed from Smith to him. The surrender by Smith of his claims upon Lansdale & Co., was a sufficient consideration. The assignments were a part of the *res gesta*, and Marr obviously intended by that mode to become responsible for the ultimate payment of the debt.

The principle settled by this Court, in *Allen* vs *Prior, &c.*, (3 *Marshall*, 305,) is, we think, conclusive of the question.

There is nothing in the case of *Perrin* vs *Broadwell*, (3 *Dana*, 598,) as contended, inconsistent with this view of the case; but on the contrary, the doctrine is there recognized, which we think is applicable to this case. It is perfectly evident that the notes of Farmer were not to have been received, and would not have been received, in discharge of the claims of Smith upon Lansdale, without the endorsement of Marr, and that with a full knowledge of this fact, he endorsed them. We do not perceive, therefore, that the Court below ruled the law erroneously upon this branch of the case.

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The material facts upon which the second question mainly depends, are the following:

The first of the four notes seems to have been collected; at any rate it is not now in controversy.

The three notes now in question, fell due the 21st of January, 1841, 1842 and 1843. Suit upon the first was brought in time for a judgment at the first term after it fell due. The petition appears to have been filed on the 20th March, 1841, and process issued on the same day. The officer returns that he served it on the 1st March, 1841. Whether the date of the service is a clerical mistake, in making out the record, or whether a mistake of the officer in making the return, does not appear. No question in regard to it, however, seems to have been made in the Court below. At the May term of the Court, 1841, the record states, that "the parties appeared by their attorneys, by agreement of whom. ordered that this cause be continued," but at the defendant's costs. At this term no pleas were filed or offered.

At the August and November terms of the Court, of the same year, the case was continued, on the defendant's motion. And at the May term, 1842, the defendant withdrew his pleas, and judgment was rendered for the plaintiff.

Upon the second and third notes, judgments were obtained at the first terms after they severally became due.

Upon the two first judgments, executions issued on the 12th day after their rendition, and were put in the hands of the officer on the 13th.

Upon the judgment upon the third note, execution issued and was put into the hands of the officer on the 17th day after the judgment was rendered. The executions were all returned *no property found.* Two of them were returned some time before the return day, the other upon the return day.

Upon this state of fact, the Court instructed the jury, "that in the commencement and prosecution of the several suits, the plaintiff had used due diligence in all the steps taken, up to the time of suing out the several executions and placing them in the hands of the Sheriff."

This instruction, as the record now stands, we think, was unauthorised and erroneous. The rule is well settled,

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MARR vs SMITH.

To secure recovery by the assignee against the assignor of a note, suit must be brought to the first term after the note falls due So a voluntary and gratuitous consent to the continuance of a cause by the plaintiff, brought on an assigned note, though brought in proper time, will forfeit his recourse against the assignor.

A delay to issue execution upon a judgment upon an assigned note for seven days after it might have issued, wholly unaccounted for, is a forfeiture of recourse against the assignor. (3 *B. Monroe*, 416.)

that an assignee must bring suit to the first term after the note becomes due, to entitle him to recourse upon the assignor, or in other words, that a failure to sue at the first term would, *prima facie*, be conclusive as to a want of due diligence. So in this case, a purely voluntary and gratuitous agreement on the part of the plaintiff to continue the cause, would in effect, be the same thing as a failure to bring the suit, and must be equally fatal and conclusive upon the question of diligence. There is nothing in the record to show any necessity or sufficient reason for this agreement, to continue the cause instead of taking a judgment at the first term. The instruction, therefore, as to the case in which there was this consent continuance, was clearly erroneous.

But again, it is insisted that a delay of seventeen days, to issue execution upon the judgment upon the third note, was such a want of diligence as should exonerate the assignor. This was a delay of seven days after the execution could legally have issued, which was held by this Court in *Baird* vs *McElroy's administrator*, (6 *B. Monroe*, 416,) the delay being wholly unaccounted for, to be a want of due diligence. To that opinion this Court, the Chief Justice dissenting, still adhere; and as there does not appear to have been any explanation or proof whatever, of the cause of the delay in this case, it follows that due diligence, as the record now stands, was not used by the plaintiff in suing out execution upon the judgment upon the third note; and consequently, that the Court erroneously, in that respect also instructed the jury.

The fact that the executions in two of the cases were returned by the officer before the return day, constituted no obstacle to the plaintiff's recovery, but such return was equally evidence of insolvency as if made on the return day.

To require the assignee to use extraordinary vigilance in suing out an execution, the fact of the necessity of using such vigilance to save the debt, should be within his knowledge, and hence the fourth instruction moved by the defendant, we think, was properly refused.

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No other error, in either giving or refusing instructions, than those indicated, is perceived.

The judgment is reversed and the cause remanded, that a new trial may be granted.

Harlan & Craddock and Cates & Lindsey for appellant; *Fry & Page* for appellee.

James *et al. vs* Langdon.

CHANCERY.

APPEAL FROM THE CASEY CIRCUIT.

Case 50.

Fraud. Instructions. Evidence. New trial. Practice.

CHIEF JUSTICE EWING delivered the opinion of the Court.

October 23.

SUSANNAH LANGDON filed her bill, which, with the amendments, draws in question and asks the annulment of, 1st. a deed made by her father, David Roper and John Roper, to David F. James, for 285 acres of land bearing date the 24th day of June, 1837. 2d. Two deeds of emancipation of David Roper's slaves, one dated the 22d day of October, 1834, the other the 21st of August, 1837; and 3d. The will of David Roper, dated the 12th of February, 1839, and admitted to record in the County Court on the 2d of September, 1839, by which he bequeathed all his personal estate to two of the slaves whom he had emancipated by the deeds, the father and mother of the residue. The annulment of the deeds and will were sought on the ground of incapacity on the part of her father, David Roper, to make the same, and fraud, influence and imposition practised upon him, in his advanced age, and feeble state of body and mind, by those in whose favor those instruments were executed.

Case stated.

Upon an issue directed by the Chancellor, a jury found against the validity of the will, and upon the hearing the Circuit Court decreed its annulment, refusing to grant a new hearing before the jury, but an injunction which had been obtained by Mrs. Langdon against a judgment at law which had been recovered against her, by Daniel F. James as the administrator with the will annexed, upon a note for a portion of the personalty bequeathed to the

The finding of the jury against the will, and decree of the court.

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JAMES et al. vs LANGDON.

slaves, was dissolved. The Chancellor also decreed a cancelment of the deeds made by David Roper to John Roper, and the deed made by David and John to James, but sustained the deeds of emancipation, and as to them dismissed the complainant's bill. James and the slaves have appealed to this Court, and Mrs. Langdon has assigned cross errors.

We concur with the Chancellor below in the annullment of the deeds under which James claims title to the land.

David Roper was, at the date of the deeds to John, his son, and James, a credulous, feeble minded, very old and illiterate man, and was greatly alarmed at a suit which had been instituted against him for alimony by his second wife, who had separated from him. He had unbounded confidence in James, his neighbor, in whose opinions, advice and counsel, he trusted implicitly, and called upon him to do all his writings, and to aid him in all matters of difficulty. He trusted in him so implicitly, that no one could inspire him with distrust of James' friendship, honesty, and strict truth and integrity. James taking advantage of his confidence and perfect submission to his opinions and will, increased his alarm by telling him that his wife would recover one third of his entire estate, including a favorite family of slaves, whose emancipation at his death, had been long the fixed purpose of his heart, and stating to him that her lawyer would not take less than $1,400 for a compromise. After thus alarming his fears and increasing his dread and apprehension of the difficulties in which he was involved, he suggested that he thought a compromise might be effected for $1,200, and that if he would let him, James, have his land, (which was worth from twelve to fifteen hundred dollars,) he would undertake to compromise and pay the amount agreed to be given. The old man yielded to the terms proposed, and in conjunction with John, executed a bond for the land upon which he lived, and in a few days thereafter made a deed. James compromised the suit in a few days, at $550, which he paid and undertook to pay, with perhaps some little costs.

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A deed procured by imposing upon the credulity of a feeble minded, illiterate and old man by one in whom he reposed confidence for an inadequate consideration, declared fraudulent and vacated.

A deed thus extorted from the excited fears and terrors of a feeble minded old man, by one in whom he reposed as his trusty friend and adviser, such implicit confidence, at a price so inadequate, ought not and cannot be permitted to stand. James was applied to and trusted in as a friend to effect a compromise. He had just grounds to believe, and perhaps did know beforehand, that a compromise could be effected at a much less sum than the value of the land, and taking advantage of the alarm of a feeble minded old man, which he, in whose opinions he confided, had been instrumental in making, he extorted from him a contract by which, according to his own acknowledgment, he made a thousand dollars clear profit.

Nor can James avail himself of the deed made by David Roper to his son John, a few weeks before, to defeat the annullment of the deed made to him. John held the land in trust for his father, as is expressly charged in the complainant's bill, and is not denied by John, who is made defendant, and the proof conduces to the establishment of the fact that it was so held. No consideration was paid by John for the same. The contract was made by the old man with James, and the consideration was to enure solely to his benefit, and John had no concern with, or participation in the contract, and joined in the deed with his father merely to pass the legal title and obviate the circuity of re-conveying the legal title, first to the father and by him to James, and should be construed to have the same and no greater effect. His joining in the conveyance to James at the instance and in fulfilment of the contract of his father, must be regarded as a surrender of the title, or abandonment of the same, in favor of his father, and upon the rescission of the contract with James, the title re-vests and enures to the benefit of the father's heirs. And if the title did not so revert, the use would, and James could not defeat the complainant's recovery, whether she was entitled to hold in the one character or the other.

A deed of emancipation declared effectual for the purpose.

2d. We also concur with the Chancellor below in sustaining the two deeds of emancipation of his slaves, Hector and Lucy, and their children. It was the settled pur-

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James et al. vs Lawson.

pose of his heart, entertained for near twenty years, and often expressed, that those slaves should serve no one after his death. Though illiterate and of weak mind, he possessed rationality and judgment abundantly sufficient at the time each of those deeds was executed, to understand and carry out this long entertained and fixed determination and purpose. At the time each of them were executed, he was an active old man, going about and attending to his farm and other business, with judgment, prudence and economy, and perfectly competent to understand the object and effect of such instruments, and procured them to be executed, and carried the latter deed to town and acknowledged it in open Court, and procured it to be recorded.

If it were conceded that the first deed should be treated as a will, and not being recorded as such, or proven by the competent number of witnesses, should not have the effect to emancipate the slaves, the last deed being good and executed and recorded, when the old man was competent to make it, the slaves were properly decreed to be entitled to their freedom.

Though the verdict of the jury be in accordance with the opinion of this Court upon the evidence, yet if the Circuit Judge improperly expounded the law to the jury, there should be a reversal and a new trial ordered.

3d. Had the jury found against the will, unembarrassed by the instructions of the Court, we should not have felt disposed to disturb their verdict. Indeed we incline to think that they should have found a verdict against the will. The will was made in his last illness, and not long before his death, at a time when his body and mind, naturally weak, were both much enfeebled by age and disease. Lucy and Hector, his two elder slaves, were attentive to his wants and he was much under their influence and control, and there is good reason to believe that Lucy used means to prejudice and embitter his mind against his children, or some of them, who visited and desired to wait on him. Indeed it is proven that he was induced to believe that his children visited him for the purpose of plundering him of his property, and there is grounds to believe that this impression was made on his mind by the tales of Lucy. If these facts be true, it is not surprising that an aged man like Roper, suffering under the pains of disease, and of a weak mind naturally, should become alienated from his children, who were

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married off and absent from him, and have his affections concentrated upon those who were daily around his person, and plying him with tales calculated to excite and prejudice his mind, even against those children who visited him. If he was not operated upon by some such feelings, why was it that he did not, when in a better state of mind, at the time when he made the deeds of emancipation, also give his personal estate to his emancipated slaves?

But we think that some of the instructions given by the Court to the jury were misleading, and may have influenced their verdict. Indeed we cannot perceive how the jury could have found otherwise than they did, if they regarded these instructions, which in effect, required them to disregard the copy of the will produced and read to them as evidence, and to find against the will, if the original was not produced.

Where a copy of a will duly proved and recorded, was produced before a jury sworn to try the validity thereof, without objection, it was error in the Court to instruct the jury to find against the validity of the will, unless the original was produced.

It is true, the will as the best evidence, should have been produced, if required, but its production may be waived expressly or by implication, and the omission to object to a copy as evidence, or waive its exclusion from the jury, should have been taken as an implied waiver of objection to the copy as evidence in the place of the original, and being admitted as evidence, an instruction should not have been given to the jury, on the trial of the merits, that it was *no evidence*, and they should find against the will because the original was not produced, when the witnesses to the will all pointed to and spoke of the will which had been proven and recorded in the County Court, and to which they had subscribed their names as witnesses in the presence of the the testator. Had the objection been made to the copy in due time, the original might have been produced, or the trial of the issue continued, at the point of time at which the objection was made. To allow the objection to be taken in the form of instructions to the jury, is to make Courts of Justice a trap to catch the unwary, or a gambling shop, in which the most cunning and successful gamester may succeed against right and justice. Besides, the question in contest, was not whether the decedent *signed* the paper as his will, but whether *he was of disposing mind and*

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JAMES *et al.* vs LANGDON.

memory, at the time when he signed it. And the witnesses spoke of, and had reference to the will in the County Court, and of its execution and establishment by the County Court, and the jury found against the will so spoken of and identified, and we cannot understand how they could have so found, unless they understood what will or paper was the subject of controversy.

Though a testator may be irrational on other subjects than the disposition of his property, yet he may be competent to make a will of his property.

The first and second instructions given at the instance of the complainant, were also misleading and erroneous. We cannot admit that if the testator was irrational upon any other subject, that he was rational and exercised judgment in making his will, and made it in conformity to his previous stated purpose and intention, that his will should be rejected upon the ground of incapacity to make it. It is true that the proof of a want of right reason on many other subjects with which he was familiar and acquainted in his better days, is evidence from which a jury or the Court in the trial of a will case, might infer a want of rationality, or capacity to make a will. But conceding, as the instructions certainly do, that the decedent possessed right reason and capacity on the subject of disposing of his property by will, the mere fact that he did not discover right reason and capacity upon some other subject or subjects, is surely no ground for a positive instruction to the jury to find against the will. A man may be perfectly competent to make a will, and understand and do other acts in relation to the control, management or disposition of his property, upon which his mind has been accustomed to act, and yet be quite irrational and lack judgment upon many other subjects on which he has not studied, or accustomed his mind to reason.

A distributee injoining a debt due to the executor, should have a credit for the debt, unless there be debts to be paid, as to which the Chancellor should cause an inquiry by a commissioner, &c.

The Circuit Court also erred, upon sustaining the finding of the jury against the will, in dissolving the complainant's injunction against the judgment at law recovered against her upon her note for the penalty. A distribution of the same should have been made among the heirs, upon the usual terms of their executing refunding bonds, after setting apart a sufficient sum in the hands of an administrator, if one should be appointed, for the payment of debts, should any remain unsettled, allowing the complainant the interest of any of the heirs, which

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she might show before the master in chancery she had purchased. And to enable the Chancellor to settle the whole matter properly and fairly, he shuld have submitted the case to the master, with proper instructions to make inquiry and report as to the debts, and amount coming to each heir. And should the jury, upon a second inquiry, find against the will, distribution should be made as directed.

For the errors indicated, the decree of the Circuit Court is reversed, and cause remanded, that the verdict of the jury may be set aside, and a new inquiry directed, and a decree rendered as intimated in this opinion, and the costs in this Court are divided.

Harlan & Craddock and Fox for appellants; *Kincaid* for appellee.

Roberts' Executor *vs* Dale *et al.*

CHANCERY.

ERROR TO THE ALLEN CIRCUIT.

Case 51.

Distribution. Refunding bonds. Auditors. Decree.

CHIEF JUSTICE EWING delivered the opinion of the Court.

October 23.

THIS is a proceeding against an executor, instituted by an assignee of the interest of one of the legatees.

There is error in the decree rendered, in this: 1st. That refunding bonds have not been required, before ordering execution against the executor. The time that has run since probate, is not so long as to justify the presumption, that there were no subsisting outstanding debts or demands against the estate.

The Chancellor before permitting executors to issue on decrees for distribution of estates, sho'ld require refunding bonds to be given by the distributees, where the lapse of time is not such as to raise the presumption that the debts are all paid.

2d. In leaving it to the Clerk to ascertain and deduct the amount of the costs, from the aggregate found against the executor, and then to divide the residue; and after ascertaining the amount of the two replevin bonds against Dale and Harlan, and the interest thereon, to deduct the same from the one third decreed to Dale, and ordering executions for the amount so ascertained by the Clerk, without the supervision of the Court. And the more especially is there error in this respect, as the replevin

A decree for distribution should ascertain the amount of each share in the estate, and not leave lengthy calculations and set-offs to be

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ROBERTS' EX'R. *vs* DALE *et al.*

bonds, or copies thereof, are not in the record, and the amounts or date of the bonds, are not shown, nor the time from whence interest has run. The Clerk is of course required to travel out of the record to ascertain these facts, and upon ascertaining them, to make the estimates, ascertain the result, and issue executions thereon. These are matters which should have been submitted to, and ascertained by the master, subject to the supervision of the Chancellor before rendering the final decree.

made by the Cl'k to ascertain each one's share, especially where the Clerk is required to travel out the record to examine papers not on file, to make such estimates. An auditor should be appointed to make and report such estimates for the adoption or revision of the Court.

And as the case must be reversed for the errors indicated, we would remark that we are not satisfied that injustice has not been done to Roberts, the executor, in fixing the amount of cash for which he is made responsible. There seems to be a discrepancy between his answer as well as the answer of Mrs. Roberts, and the amount of cash reported in the inventory. Both answers alledge that there was only thirty dollars on hand at the death of the decedent, one third of which was paid to Mrs. Roberts, yet two hundred and forty three dollars, ($243,) is reported in the inventory as on hand. May not the sum so reported be the same $242 which the executor admits he received from Virginia, after the death of his testator, with one dollar which he admits he received from another source? And may he not, through mistake and oversight, have supposed that the amounts so received had not been reported in the inventory, when, as the inventory was not made till September, they were in fact received and embraced in the same? If this be so, the executor has been charged twice with the same amount. A further enquiry should be directed through the master upon this subject.

The practice of the Courts in finally hearing causes involving the settlement of accounts without the intervention of the master, and the aid of his report, is not only troublesome to the Circuit Courts, but to this Court, and is unsafe to

And here we would remark, as we have often remarked, that the practice of finally hearing causes involving the settlement of accounts, without the intervention of the master and the aid of his report, is not only burthensome to the lower Court, and also to this Court, but is unsafe to litigants. The master may take additional proof as to doubtful items, and call upon the parties upon oath, to explain, and reporting the settlement and proof by which each item is sustained, with the result, to the Court, not only facilitate the labors of the Court and relieves

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him from the mere clerical drudgery of making out the account, but time being allowed to the parties to except to any erroneous item, and show cause against it, adds greatly to the safety of litigants, and their security against inadvertance or mistake, and enables this Court to see the basis upon which the decree was made to rest, without traveling through a tedious calculation to ascertain whether the decree is right or wrong. It is questionable whether this Court ought not to reverse a decree for this single omission, in a case involving the settlement of conflicting accounts, on account of the superior safety of the practice indicated. In a doubtful case we should feel it our duty to do so.

litigants. "Might this Court reverse for an omission alone in cases involving the settlement of complicated accounts? In a doubtful case we should feel it our duty to do so."

The decree is reversed and cause remanded, for the errors suggested, and upon the return of the cause it is directed that it may be submitted to the master, with instructions to take proof and make inquiry, by calling upon the parties on oath, if the opposite party desire it, or the master deem it proper for his own information, in relation only to the doubtful matter suggested, this Court being satisfied with the estimates made and amounts of debits and credits allowed in all other respects, as well as with the decree upon the merits, except as before indicated, and that the master ascertain the amount of costs, also the amount of the replevin bonds and interest, and adjust the same as directed by the decree, making such change only as his inquiries may authorize, in relation to the debit for cash, made against the executor, and that a decree may be rendered as intimated in this opinion, and the costs of this Court are divided.

B. & A. Monroe for plaintiff; *Letcher & Tilford and Underwood* for defendants.

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CHANCERY.

Rowe *vs* Williams.

Case 52.

APPEAL FROM THE RUSSELL CIRCUIT.

Sheriffs' bonds. Actions. Executions.

July 10. JUDGE MARSHALL delivered the opinion of the Court, which was suspended, by petition for a re-hearing, until the 25th of October, when the petition was overruled.—REPORTER.

Case stated. THIS was an action on the case by Rowe against Williams, as Sheriff of Russell county. The defendant filed a demurrer to the declaration, which was overruled; and a verdict having been found for the plaintiff, the judgment was arrested for some defect in the declaration, which having been amended, was adjudged insufficient on demurrer. No further amendment being offered, judgment was rendered against the plaintiff, who brought the case to this Court for revision, presenting no other question but as to the sufficiency of the declaration.

First count. The action is brought by a security in an injunction bond. The first count alledges that after the injunction was dissolved with damages, the plaintiff in the judgment which had been enjoined, caused executions to issue on the judgment for the debt, interest and costs, and on the decree of dissolution for the damages and costs therein, which were directed to the Sheriff of Russell county, and while in full force, came to the hands of the defendant, then being Sheriff of said county; that while so in his hands, the defendant therein, Smith Turner, for whom plaintiff was surety in the injunction bond, owned and had in his possession ten slaves, of value more than sufficient to pay said executions, on which the said Sheriff might and ought to have levied, for the satisfaction of the same, but that in violation of his duty, he negligently and unlawfully failed and refused to make any levy on them or any of them, and suffered and permitted said slaves, while the executions were in his hands in full force and unsatisfied, to run and be run and carried off from the county of Russell and the Commonwealth of Kentucky, leaving said executions wholly unsatisfied. By reason

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of which negligence and the insolvency of Smith Turner, the plaintiff has been compelled, as the surety of Smith Turner in the injunction bond, by the judgment of the Russell Circuit Court, in a suit brought on the bond, to pay the amount of said executions and costs, and has so paid a large sum, viz: $1,200.

Second count.

The second count alledges that the ten slaves, the property of Smith Turner, and more than sufficient in value, &c., were given up by him to the defendant, in the county of Russell, to be sold in satisfaction of the said executions while they were in his hands in full force, but that he negligently and unlawfully, and in violation of his duty, permitted them to remain in the possession of Smith Turner after levied on, without taking a forthcoming bond for their delivery on the day of sale, as required by law, and went on to advertise a sale, but before the day fixed, the slaves were removed and carried off out of Russell county and out of the Commonwealth; nor did Smith Turner pay any thing, nor the defendant make any thing on said executions; but the defendant, as Sheriff, illegally and unjustly returned them to the office whence they had issued, and falsely and illegally endorsed thereon, a return in which he falsely and wilfully omitted to say any thing about the levy of said executions or either of them, on the slaves or any of them, &c. &c., but falsely and illegally returned, among other things, that he could find no property, &c. &c., after crediting an inconsiderable sum, out of which to make the balance of said executions; that Smith Turner became insolvent and left Kentucky with his property and nothing could be made, &c., after the defendant's illegal conduct, &c. In consequence of which the executions were not paid, and the plaintiff was sued on the injunction bond and compelled to pay, and did pay, &c. &c.

It seems entirely obvious that upon the facts stated in each count, and especially in the last, the Sheriff has been guilty of a breach of duty by which the plaintiff has been greatly injured; and we do not perceive on what principle the right of action can be denied, unless it be on the ground that the duty which the Sheriff has violated, was not owing to the plaintiff, or that the plaintiff's

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ROWE vs WILLIAMS.

interest in its performance was too remote to authorize an action for its breach.

This case distinguished from the case of *Hawkins* vs *The Com'wth.* (3 *A. K. Marshal* 339.)

The case of *Hawkins* vs *The Commonwealth*, (3 *A. K. Marshall*, 339,) has been referred to as deciding that the party suing the Sheriff must have a legal interest in the subject affected by his violation of duty. But that case only decides between the legal and equitable holder of the same demand, that the action for an injury to it by the Sheriff, (as by his failure to levy an execution issuing on a judgment which has been assigned,) must be brought by the party having the legal title, that is, by the plaintiff therein, and not by the assignee, whose title is equitable only. There the plaintiff in the judgment and his assignee, were in effect trustee and *cestui que trust.* Their interests were identical; or rather there was but one interest, and that interest could only be asserted in a Court of law by the trustee, whose name the assignee had a right to use. In this case there is no such identity of interest and no such relation between the plaintiff in the executions and the plaintiff in this action, then surety in the injunction bond. It is true that any effectual proceedings upon the executions would have enured to the benefit of the injunction surety. But the plaintiff in the former was not bound to pursue them. He might at once, upon the dissolution of the injunction, have sued upon the bond. He may indeed, after taking out the executions, have been bound to pursue them to their direct results. But upon a default of the Sheriff he still had his election to pursue his remedy against him, which would have enured to the benefit of the surety, or to have turned to his remedy upon the bond. His release of property taken on the execution, would doubtless have operated *pro tanto*, at least, to the relief of the surety. And the surety might, by making payment on the bond, have become equitably entitled to the use of the executions in the name of the plaintiff, and perhaps to the remedy in his name, for the default of the Sheriff. In the assertion of either of these rights, he would in effect, have been the equitable assignee of the plaintiff, and on the principle of the case referred to, he could not have sued the

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Sheriff in his own name, for an injury to the plaintiff in the execution.

But here he sues not for an injury to that plaintiff. He claims nothing through him, and does not sue in his right. He sues indeed, for the same act or omission which was an injury to the plaintiff in the executions, but he sues for it as a direct injury to himself; and to show that although the act or omission complained of may be the same, the injury in the two cases is different, it is enough to remark that the liability of the surety to make good the debt which is the sole ground of his right to complain, is the very cause why the default of the Sheriff, though in law an injury to the original plaintiff, may have occasioned but slight actual damage; and this consideration shows the utter inadequacy of the action in the name of the original plaintiff against the Sheriff, as a remedy for the injury sustained by the surety in the injunction bond.

The case of *Staton* vs *Com'wth. for Gill*, stated and recognized as identical in principle with this.

Is it possible, then, that when the creditor is pursuing his remedy by executions against the real debtor alone, and that remedy will, if the Sheriff does his duty, prove entirely effectual to relieve the surety in a collateral bond, the Sheriff may by his neglect or misconduct in the management of the executions, render them utterly fruitless, and throw the whole debt upon the surety in the bond, without any direct liability to him for such an injury? In the case of *Staton* vs *Commonwealth for Gill*, (2 *Dana*, 397,) the surety in an execution, as relator, sustained an action upon the Sheriff's bond, for his failure to levy the execution on the property of the principal debtor, which he had taken on a junior execution. The case before referred to shows that if he could maintain an action on the bond as relator, he could have maintained an action on the case in his own name. And his right to maintain the action on the bond was not even questioned. In substance that case is nearly identical with this, and they differ but little in form. In some points the present case is stronger in favor of the action, and particularly in the fact, that while in each case the surety was bound to pay the debt, in that case the Sheriff might have levied in the first instance on the property of the surety, and was only under an equitable obligation to

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ROWE
vs
WILLIAMS.

favor him, by making the debts out of the principal if in his power, whereas in this case the Sheriff had no power to make the debt out of the surety, but was absolutely bound, if in his power, to make it out of the principal, against whom alone he had the executions. But the material point in *Staton* vs *Gill*, is that the Sheriff having actually seized the property of the principal debtor, it was his duty to apply it to the elder execution in his hands, whereby Gill, the surety, would have been relieved, that he violated this duty in applying the property to the junior execution, whereby Gill remained liable for the other debt, and was compelled to pay it. And for this injury to Gill, arising from this misapplication of the property to the junior execution, Gill was allowed to sue. Or else the principle of the case is, that for mere neglect to levy the elder execution on the property of the principal debtor, whereby the debt was thrown entirely upon Gill, he maintained the action.

Upon the dissolution of an injunction, execution issued for the principal debt, and was placed in the hands of the Sheriff, to whom property was delivered by the defendant in the execution to sell to pay the debt, the Sheriff left the property in possession of the defendant, the property was run off out of the State, and the defendant proved insolvent, the surety in the injunction bond was sued, and paid the debt of the principal.—Held that the Sheriff in an action on the case for the misfeasance, was liable to the surety in the injunction bond, who by the misconduct of Sheriff had been rendered liable.

Without restating the present case, it is manifest that the injury in both is the same, but that the right of the present plaintiff, so far as it depends upon the right and duties of the Sheriff, is stronger and more palpable. Why then may he not sue? We do not feel the force of the answer offered, that it is because he was not a party to the execution itself. The question is, whether his legal right or interest has been injuriously affected by the acts complained of, and not merely whether he had a legal interest in the execution itself. What interest had Gill in the execution against him and his principal? He had no legal title to the execution itself, and no other equity or interest than that it should be properly used as a means of coercing the debt from his principal. This was his interest in the Sheriff's performance of his duty. His action was founded upon an injury to this interest. If the Sheriff, in consequence of this interest, owed a legal duty to him so to conduct the execution as not to injure his interest, did not the Sheriff in this case owe a like duty to the present plaintiff? As in each case the proper application of the property of the principal, according to the power and duty of the Sheriff, would have operated directly and *ipso facto* as a payment of the debt, and as a

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legal discharge of the sureties, we do not know how to denominate the right of the sureties to have this application made, or their interest in its being done, or the corresponding duty of the Sheriff, unless it may be called legal. Nor can we characterise the breach of duty on the part of the Sheriff, whereby this right and interest are directly destroyed, otherwise than as an injury to a legal right by the violation of a legal duty. The case of the *Bank of Rome* vs *Mott*, (22 *Wendell*, 556,) has been referred to in support of the position, that none but the plaintiff or defendant in the execution can sue the Sheriff for the neglect of duty in the conduct of that execution. That case in effect decides that it is not sufficient for the plaintiff to show, that by the misconduct of the Sheriff in conducting an execution between other parties in which he had no interest, the defendant therein being also his debtor, has been rendered unable to pay him his debt. Or that by such misconduct the execution not being satisfied, the creditor has resorted to a mortgage on other property, and thereby withdrawn from the plaintiff a junior mortgagee a part of his security, and lost to him a part of his debt.

But in these cases the party complaining had no direct interest in the management of the execution, or the application of the debtor's property for its satisfaction. The debt to be satisfied was not his debt. The failure to satisfy it did not leave him to pay it. And its satisfaction would not have operated as a discharge of his liability. He was a stranger to the debt. His interest was in the subjection of other property to his demand. And although this interest may have been injuriously affected by the sacrifice of the same debtor's property under another execution, the injury was remote, uncertain and contingent. But in the case of *Whitaker* vs *Sumner*, (9 *Pickering*, 308,) an action was sustained by a junior attaching creditor against the Sheriff, for making a false return upon prior attachments which had been levied on the same property, by means of which false return the plaintiff derived no benefit from his attachment. There, although the plaintiff was a stranger to the process on which

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ROWE
vs
WILLIAMS.

The right to maintain an action against a Sheriff for misconduct in the management of an execution, is not always limited to the parties to the execution, but exists in favor of any whose legal rights are affected by the illegal act of the Sheriff.

the false return was made, his relation to the same property was such an interest as authorized him to sue.

We cannot concede, therefore, that none but a party to the execution can sue the Sheriff in a case for his default in its management. And although in the case last cited, the action was not simply for neglect, but for a false return, yet the question is still the same, viz: whether the legal right or interest of the plaintiff has been affected, or in other words, whether the defendant has violated a legal duty which he owed to the plaintiff. We think the declaration in this case shows such a violation, not in making the false return, which so far as we perceive, did not injure the plaintiff, but if not in failing to levy on the property of the debtor, as he might and ought to have done upon the facts stated in the first count, at least in permitting the slaves to remain in possession of the debtor without a forthcoming bond, after levying on them, as alledged in the second count, which was not a mere nonfeasance, but a misfeasance. The effect of a levy upon the judgment and upon the liability of the present plaintiff, need not now be stated. The injury consequent upon a failure to levy when it might and should have been done, and especially on a failure to hold the property after a levy was made, is apparent. We think the second count of the declaration at least, is substantially good, as showing a cause of action, and the demurrer being general to the whole declaration, should have been overruled.

Wherefore, the judgment is reversed and the cause remanded, with directions to overrule the demurrer, and for further proceedings in conformity with this opinion.

B. & A. Monroe for appellant; *Goodloe* for appellee.

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Anderson's Administrator *vs* Irvine.

DEBT.

ERROR TO THE FAYETTE CIRCUIT.

Case 53.

Administrator de bonis non. Evidence. Devastavit.

CHIEF JUSTICE EWING delivered the opinion of the Court. *October* 24.

Case stated.

THIS case was formerly before this Court, and reversed upon the single ground that the Circuit Court had erred in excluding the testimony of Goodloe, a removed administrator. The case is reported in 5 *B. Monroe*, 488. Upon the return of the cause on the second trial, additional evidence was offered, the object of which was to make out the interest of Goodloe, and he was again excluded, and Anderson's administrator has again appealed to this Court, and it is now urged that under the statute, the suit may be prosecuted jointly against the removed administrator and the administrator *de bonis non*, and if so, Goodloe, as a party, should be excluded.

Does the statute authorize a suit brought against an administrator who is afterwards removed and the suit revived against the adm'r. *de bonis non*, to be still continued ag'st. the removed administrator? QR. If it does, there should be some evidence of the intention so to prosecute it placed upon the record.

Whatever advantages might result to the creditor in reviving and prosecuting his suit against the newly appointed administrator, in conjunction with those that were removed, such a proceeding is not specially provided for in the act, nor are we inclined to think that it was within the contemplation of the Legislature, and if it might be done without doing violence to the provisions of the statute, it was not done in this case, but the suit revived and prosecuted alone against Boyle, and judgment recovered against him alone. If the suit was intended to be revived and prosecuted against all, there surely should have been some notification to the removed administrator, or indication of an intention to proceed against all.

Where an adm'r. who has been removed is not shown to have committed a *devastavit*, he is a competent witness for the administrator *de bonis non*. The fact that an ad-

The additional proof advanced, does not take the case out of the operation of the principle settled by this Court, as to the interest of Goodloe, when the case was formerly before us. There is no satisfactory proof that Boyle has not in his hands sufficient assets to pay the judgment, in case a recovery should be had against him. On the contrary, if he or the removed administrator have done their

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BLACK *et al.* vs BUSH *et al.*

Administrator consented to the distribution of the slaves when there was a sufficiency of personalty to pay pl'tiff's demand, does not prove the adm'r. guilty of a *devastavit*.

duty, which, rather than the contrary, should be implied, the presumption may be indulged that he has. And no proof establishing a devastavit on Goodloe, nor creating a probable presumption of a devastavit on him, has been adduced. The fact that he had consented to the distribution of the slaves among the heirs, which is the last estate to be sold for the payment of debts, is no evidence of the fact of a devastavit, when it is shown that an amount of other personal assets, more than ten times the amount of the plaintiff's debt, had come to his hands, and which are not shown to have been distributed or disposed of. We cannot indulge the presumption of bad faith against an administrator, (who under our laws, has no more ultimate interest in the estate than any other naked trustee,) and upon such presumption, exclude him from testifying, on the score of interest.

The judgment is reversed and cause remanded, that a new trial may be granted without the payment of costs.

Goodloe for plaintiff; *Robinson & Johnson* for defendant.

CHANCERY.

Case 54.

Black *et al. vs* Bush *et al.*

ERROR TO THE CLARKE CIRCUIT.

Partners and partnership. Substitution. Usury. Practice in chancery.

October 26.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

BUSH, the administrator of Azariah Martin, deceased, filed his bill for a sale and distribution of the proceeds of his estate, under the statute of 1839, (3 *Stat. Laws*, 240,) in which he makes the creditors and heir of the deceased parties, also Wm. C. Thomas, alledging that he and the decedent were equal partners in all the estate owned or possessed by both or either, and subject to equal responsibility for all the debts, and that the whole of the copartnership effects were insufficient to pay the debts and liabilities, and praying a sale of the real estate and a *pro rata* distribution.

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1st. We concur with the Chancellor in disallowing the assignments made by Thomas to Black and Bobert Martin, of his share of the proceeds of the sale of the firm effects, which had been made by Bush as administrator, under the power that had been given him to sell by Thomas and Martin, and *apply the proceeds to the payment of the firm debts.* We regard the power to sell, connected with the *direction to apply the proceeds*, as investing the funds in Bush, *in trust*, for the use and benefit of all the creditors of the late firm of Thomas & Martin, and that the power to revoke or change the destination of the fund could not be exercised to the prejudice of the *cestui que trust*, in a rateable distribution of the fund, upon terms of equality among them. And the more especially should this construction be carried out and enforced, from the consideration that the firm was insolvent and its whole means insufficient to pay the firm debts, and a suit was then pending in which the surviving partner and heir of the deceased partner, and all the creditors were before the Court, as defendants to a bill filed by the administrator, alledging the insufficiency of the entire firm effects to pay the firm debts, and in which the creditors, through the administrator, were in effect asserting their demands against the firm, at the time of the assignment, and asking a rateable distribution of the partnership funds, all of which were necessary to pay those debts, and to that end must be sold.

One partner has no right to divert by his assignment to his separate creditors, any portion of the firm effects to the prejudice of the creditors of the firm.

Besides, each partner had a lien upon the firm effects, for the payment of firm debts, and the firm creditors have a right to be substituted to the lien of the partner, in the application and rateable distribution of the firm effects among them, upon terms of equality, especially when the firm is insolvent, and the whole subject is under the control of the Chancellor.

Each partner has a lien upon the partnership effects for the payment of the firm debts, and the firm creditors have a right to be substituted to the lien of the partner in the application and rateable distribution of the firm effects, in case of a deficiency.

2d. We have had great difficulty and doubt as to so much of the decree of the Chancellor as rejects so large an amount of the claims and demands set up and asserted by Black. The relationship between him and the partners, the efforts to accumulate in his hands the funds of the firm, the partnership between him and them in the distilery, the true state and condition of which is not

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BLACK *et al.* vs BUSH *et al.*

shown, nor how it was settled, or whether profit or loss accrued, the numerous dealings between them, the fact that notes, for large amounts in cash, are executed, at short intervals between them, pretended to be for loaned money, exceeding all reasonable estimate that can be made of such rapid accumulation, in cash, in the hands of Black, from any sources of income that he is shown to have possessed, the fact that he is detected in presenting one false demand, taken in connection with the proof of his confessions in the cause, are calculated to cast a cloud of suspicion over his claims, and to create a strong presumption against them. The precise amount that should be allowed, is extremely difficult to determine. We are not satisfied that the Chancellor below has done injustice in rejecting the amount that he rejected, and cannot feel satisfied to reverse his decree on that ground.

Black purchased land of Thomas and assigned a note, the land was not paid for, Thomas was insolvent, Black had to pay for the land, in a settlement of the estate of Thomas under the statute of 1839.—The note assigned should be restored to Thomas.

3d. But we think that the note assigned by Black to Thomas, in the purchase of the land, should have been allowed to Black, in addition to the claims allowed him. Bush retains a lien upon the land sold by Thomas to Black, for the whole consideration of Thomas' purchase from Bush. Thomas is insolvent and the whole burthen of payment falls upon Black, he ought, therefore, to be restored to the note which he gave to Thomas, in his purchase, and be allowed to set it up in the rateable distribution of the funds of the firm, in the same manner as if it had not been assigned to Thomas, otherwise he will be made to lose the land or the full value thereof, out of other claims due him, and also lose the note.

One who was insolvent became a creditor of an insolvent, by taking up the notes of the latter, to which there was sureties, and giving his own note with surety, in a settlement of the estate of the decedent under the statute of 1839, the sureties to the new notes should be allowed to prove the claim, and share *pro rata* with other creditors.

4th. We also think that though Thomas was properly refused the right to set up any notes which he had taken up, yet as he is wholly insolvent and the burthen of paying any new notes which he has executed with sureties, must devolve on the sureties, and as the creditors if the old notes had not been lifted by new notes, would have had the right to come in for a rateable distribution, it is just and equitable that the sureties to the renewed notes, should be substituted to the rights of the creditors, and be allowed to set up and claim distribution upon the notes taken up.

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6th. Though the evidence of Thomas, the principal obligor, was not sufficient to authorize the usury to be deducted from John Martin's notes, it was sufficient to authorize a further enquiry into the matter, by interrogatories to John Martin, who is before the Court, which the Chancellor should have required the master to make, and to take further proof, if to be had, on the subject. With the statement of Thomas upon oath, specifying the usury, the Chancellor should not have permitted the matter to pass without a strict scrutiny.

The Chancellor when the facts disclosed authorize it, should refer the question of usury or no usury to the master for inquiry and report.

The decree of the Chancellor is reversed for the errors suggested, and cause remanded, that the case may be again committed to the master, and further enquiry made, as intimated, as to the usury embraced in John Martin's notes, and report made and decree rendered as indicated in this opinion.

Turner for plaintiffs; *Hanson* for defendants.

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Graves *vs* Graves.

PET. & SUM. *Case* 55.

ERROR TO THE WASHINGTON CIRCUIT.

Consideration.

JUDGE MARSHALL delivered the opinion of the Court.

October 26.

THIS was an action by petition and summons, on a note exected by J. Graves to N. Graves, for $318. The defendant pleaded that he executed the note "as a promise to give the plaintiff, who was his brother, a mere gratuity, and without any good or valuable consideration whatever." To which the plaintiff replied that the note was not given to him by defendant as a mere gratuity, but because he was the brother of the defendant, and because the defendant was indebted to him, and was given for a good and valuable consideration, concluding to the country.

Case stated and issue.

Upon the trial of the issue thus made between the parties, it was proved, that after the death of John Graves their father, N. Graves, who had resided in Illinois, came to Kentucky, and contended with his brothers and sisters

The evidence in the case.

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GRAVES vs GRAVES.

that they ought to give him something to make him equal to themselves in what they had received from their father's estate, not asserting, however, any enforcible claim or right, but contending that he was entitled, in justice, to be made equal. The father had made large advances to him while in Illinois, and therefore gave him much less than his other children, by his will; and Nathan asked contribution from the others, not as an enforcible right, but as a gratuity, which he thought justly due, because, as he said, he had not in fact received an equal share, &c. The brothers and sisters agreed to make him equal to themselves. And accordingly, William Graves, a brother, gave him a negro girl estimated to be worth $318; Felix Graves, a brother, executed his note to him for $318, and paid it; Allen Mays, a brother-in-law, did the same; and the note now in question was executed by the defendant on the same account. The amount for which the notes were given, was fixed by reference to the value of the slave given by William Graves, without any calculation to ascertain the precise deficiency in the share received by Nathan from his father, and as the bill of exceptions states, without any express admission, that in point of fact he had received less than they had.

An agreement between several children of a testator to contribute to raise a fund to make one equal with the others, and the payment thereof and execution of notes therefor, is a good consideration to sustain a note given by a party to such agreement for his proportion of the sum agreed to be paid.

Conceding, as we are inclined to do, that the fraternal relation, and the love and affection properly belonging to it, would not alone be sufficient against the plea of no consideration to sustain even a written promise, and doubting as we do, whether the additional fact, that by the will of the common father, one brother had received more of his estate than the other, would furnish a valuable consideration by which the note might be upheld, we are of opinion, that in this case the note does not merely rest upon the consideration of love and affection between brother and brother, nor upon the existence of an obligation on the part of one brother to renounce the partiality, or remedy the supposed injustice of the father, by equalising the unequal distribution which he has himself made of his own estate. If, as far as these inducements are concerned, the note now in question should be deemed purely gratuitous, and without such consideration, either good or valuable, as would make it enforcible in law,

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there is still an additional inducement, which, as we think, suffices to give value to the consideration, and to sustain the note.

The brothers and sisters of the plaintiff, though under no legal obligation to yield to his appeal, did, from fraternal affection, combined either with a sense of justice or a feeling of compassion, agree to contribute equally to the satisfaction of his claim upon their affection, justice or charity. There was no mistake or deception as to the nature of his claim or of their obligation. But voluntarily and understandingly they yielded to his request, and agreed among themselves to make equal contribution, or pay a designated sum, for the purpose of remedying wholly or in part the alledged inequality, or as might be conceded for the sake of the argument, for the purpose of enabling their brother to support his family or to go into business. Suppose such an agreement, expressive of any of these objects, had been reduced to writing executed by the parties intending to contribute, as an agreement between themselves. Would not the promise of each be a sufficient legal and valuable consideration for the promise of each of the others? And if three had performed their undertakings by making payment, and the fourth refused, might they not sue him for his breach of promise, and recover either for the benefit of the party to whom the contribution was to be made, the full sum agreed to be paid by each, or for their own use, such a sum, as when divided between them would equalize, though it would reduce the contribution? We suppose, that although the parties may have been under no obligation to enter into such an agreement, yet when actually entered into, it would of itself furnish a sufficient consideration to make it binding on each of them, and that a failure of any one to perform his undertaking, and especially after others, under the inducement furnished by his promise, had performed theirs, would be a breach, not only of moral, but of legal duty to them. And this being so, we think it clearly follows that the notes executed by each of the parties to the person intended to receive the contribution, being based upon this agreement, and in execution of it, have in the agreement itself, a valuable considera-

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GRAVES vs GRAVES.

tion legal and sufficient to support them. If no notes had been executed directly to the interested benificiary, and the case stood on the agreement between the intended contributors, the benificiary being a stranger to the consideration and no party to the contract, could not, perhaps, enforce it in his own name. But the notes being made payable to him, there is no question, but as to the existence of a sufficient consideration. And it is immaterial whether the consideration proceeded from him or from another for his benefit.

The instruction which should be given upon the facts as presented in the bill of exceptions.

In the present case, it is true there was no written agreement by which the brothers and sister of the plaintiff stipulated with each other to make equal contribution. But there was a verbal agreement of the same import, carrying with it a similar obligation and a similar consideration. By the promise or agreement of the other three, William was induced to give a slave of the value of $318, in execution of his part of the agreement; and even if the mutual promises were not a sufficient consideration for each other, and if the agreement, while unexecuted by any, could not have been enforced by any, yet when one of the parties, in faith of the agreement of all, parts with his property in pursuance of it, and for the common object, an obligation, not merely moral, but at least equitable, if not legal, is imposed upon the others to perform their promise. And this obligation constitutes a valuable consideration for the notes executed by each, for securing a contribution of equal value with that made by William Graves, and especially when they admit that the contribution made by the first is not greater than is required by the agreement and its objects, and that it furnishes the proper measure for their own. It is too late, after one or more have, in fulfilment of the common agreement, made contribution to the common object, for the remaining one or more who may be delinquent, to say they had no interest in the common object, and no expectation of benefit from it. In this view of the law and evidence of the case, the plea of no consideration was not supported. And although it may not be technically true that the defendant executed the note because he was indebted to the plaintiff, yet it is substantially so since

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he was bound by his agreement with the other contributors, to pay to him the sum for which the note was executed. Without detailing the instructions given and refused, it is sufficient to say that the case was not placed before the jury upon principles accordant with this opinion, and the verdict was contrary to the law, as arising on the facts clearly and rationally deducible from the evidence.

Wherefore, the judgment is reversed and the cause remanded for a new trial, in conformity with the principles of this opinion, and in which, should the evidence be substantially similar to that herein stated, the jury should be instructed that if they believe, from the evidence, that it was mutually agreed between the brothers and sisters of the plaintiff, or any number of them, the defendant being one, that they would contribute equally to the satisfaction of the plaintiff's claim or his wants; that one of them, in consequence of that agreement, advanced to the plaintiff a slave, and the others, and among them the defendant, on the same account, executed their notes respectively, to the plaintiff, for a sum equal to the estimated value of the slave, and that the note now in question is the one thus executed by the defendant, there was upon these facts, a sufficient valuable consideration for the note, and they must find for the plaintiff the issue formed on the first plea.

Shuck for plaintiff; *McHenry* for defendant.

Anderson *vs* Mannon, &c.

CHANCERY.

ERROR TO THE MASON CIRCUIT.

Case 56.

Principal and sureties. Contracts.

JUDGE BECK delivered the opinion of the Court. *June* 8.

This opinion was suspended by petition for re-hearing, until the 28th October, 1846; when the petition was overruled.

IN December, 1840, Mannon became surety for Runyan in a note to Anderson for fifteen hundred dollars, payable twelve months after date. The object of the bill and decree of the circuit court.

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ANDERSON vs MANNON, &c.

Upon this note, Anderson having obtained a judgment against Mannon, the latter exhibited his bill in chancery, seeking relief against the judgment, upon the ground that after the debt became due, Anderson had given indulgence to Runyan, the principal debtor, upon his undertaking to pay 10 per cent. interest.

It is alledged in the bill and substantially admitted in the answer of Anderson, that shortly after the maturity of the note, he agreed to indulge Runyan upon it for seven months, in consideration that Runyan would pay interest at the rate of 10 per cent. The interest for the stipulated forbearance was thus arranged, Runyan credited Anderson upon his books with $19 80, the amount of a store account due him by Anderson, and executed his note for $67 70, for the residue, the two sums being the interest at 10 per cent. upon $1,500, for the period of indulgence. This agreement was without the consent or knowledge of the surety.

The Court below granted the relief sought, by perpetually enjoining the judgment at law, and Anderson has brought the case to this Court.

Whether the agreement for indulgence exonerated the surety, is the only question for determination.

An agreement for delay between the creditor and principal debtor, though without the assent of the surety, does not exonerate the surety, unless it be a binding agreement, upon sufficient consideration and enforcible by law. (1 *B. Monroe*, 322, 325. cited and approved.)

It may be assumed as the settled doctrine, that an agreement for delay between the principal debtor and creditor, will not exonerate the surety unless it be a binding agreement, one that has a sufficient consideration to support it, and which is enforcible by law. It was so expressly decided by this Court in *Tudor* vs *Goodloe*, (1 *B. Monroe*, 322,) and hence in that case it was held that indulgence granted upon a promise by the principal to pay the creditor 12 per cent. did not release the surety.

In *Kenningham* vs *Bedford*, (*Ibid*, 325,) it was held, as the usurious interest was actually advanced at the date of the contract for indulgence, that the contract was not *void*, and that the surety was thereby released.

In the first case cited, the contract on the part of the debtor, was wholly executory and prohibited by law. In the last case, the contract was entirely executed by the debtor, and was, therefore, held not subject to be avoided or rescinded by the act or volition of the creditor.

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An agreement by a creditor with the principal debtor to indulge in consideration of the note of the principal debtor for part of the accruing interest, whilst the note still carried interest (which was usurious) and the entry of a credit for the balance of such interest on the account of creditor for goods sold due to the principal debtor, without any release of the account, was not such a binding agreement as to release the surety, though made without his assent.

In the case under revision the consideration of the agreement for indulgence was also usury. The note for $1,500 bore interest from its maturity. There was no credit upon it and no provision appears to have been made that it was not to carry interest during the period of the promised delay. It was, no doubt, understood by the parties, that the interest upon the $1,500 and the interest provided for in the note for $67, were not both to be paid; but still no provision was made in view of that state of case; as the note for $1,500, therefore, continued to bear interest, the note for $67, and the credit to Anderson for the $19, were both entirely usury; and the case comes clearly within this principle of the case of Tudor *vs* Goodloe, except so far as the credit may create a distinction.

The credit appears to have been entered upon the books of Runyan, and the account of Anderson thereby *prima facie*, satisfied and discharged. But the credit was not based upon any actual payment nor upon any consideration deemed valid in law. There was no release of the account by Runyan, and he surrendered to Anderson no obligation for its payment. The credit was not an effectual discharge of the claim, and would constitute we apprehend, no bar or valid defence for Anderson, should Runyan attempt the collection of it. Runyan surrendered nothing, and gave up no right which he could not afterwards, at his election, effectually assert. Anderson acquired nothing by the credit. He was equally liable afterwards as before, for the payment of the account, at the election of Runyan. Did the credit, in effect then, amount to any thing more than a promise or assurance on the part of Runyan, not to claim or collect the amount?

In Tudor *vs* Goodloe, the debtor agrees to pay what the creditor cannot collect. In Kenningham *vs* Bedford the debtor advances money, which at his election, he has a right to reclaim. In this case he agrees to give up and not collect what he is entitled to, and has a right to collect. This is not exactly analogous to either of the cases cited, and perhaps may be regarded as to some extent, coming within the principle of each. There is certainly

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but a slight shade of difference from the case of Tudor *vs* Goodloe.

But supposing, as contended, the case as to the credit, falls within the principle of Kenningham *vs* Bedford, still we think the contract was not, in equity, obligatory upon Anderson, and formed no obstruction to the legal or equitable rights of the surety.

—Being voidable by the debtor in part, and being a unit, was not so far binding as to release the surety.

The contract was a unit, an entirety. The note for the $67 constituted a part of it as well as the credit. The whole contract could not, certainly be enforced by Anderson. It was utterly void as to the $67 note, and as to the credit, if not void, it was without consideration and voidable, at the election of Runyan. Anderson might have disregarded it and sued upon the $1,500 note.

It follows, that the Circuit Judge erred as to the extent of relief decreed the complainant. He alledges that the note for $1,500 contained usurious interest, and the allegation is admitted by Anderson. To that extent and no further, we think the complainant was entitled to relief.

The decree is, therefore, reversed, and the cause remanded for further decree consistent with this opinion.

Beatty for plaintiff; *McClung and Taylor* for defendants.

DEBT.

Kelly *vs* Lank and Stephens.

Case 57.

ERROR TO THE WARREN CIRCUIT.

Practice. Oyer. Official acts of Public Officers. Pleading. Evidence.

October 31.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

LANK AND STEPHENS, for the use of Brewster, brought a suit in debt, upon a record of the State of Mississippi, the object of which was to recover against Kelly, as surety of Ferguson and Sibly, on a forthcoming bond, which purports to have been executed for the delivery of four slaves, levied on as the property of Ferguson, on the day of sale, and which is avowed to have been returned by the Sheriff to the Court as forfeited for the non-delivery of

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the property, as required by the statute of said State, which statute gives to the bond the force and effect of a judgment, and upon which execution may be taken.

The pleadings.

Numerous pleas were filed, to which demurrers were sustained, some of which, namely: the 2d, 5th and 7th only, we deem necessary to notice.

The second plea alledges that there is no such judgment, and prays the judgment of the Court.

The fifth plea in substance avers that he signed and sealed said bond as the surety only, and delivered the same to Ferguson, one of the principals, as an escrow, to be delivered to the Sheriff, upon the terms and conditions only, that all the principals in the execution should execute the same, and that Tilman, one of the principals, had never executed the bond, nor had the bond ever been delivered by him to the Sheriff in any other manner than as averred.

The seventh plea pleads the same matter as is relied on in the fifth plea, with the additional matter interlarded into the plea, that the bond was in blank when delivered to Ferguson, and was afterwards filled up and delivered to the Sheriff without the signature of Tilman.

Issues were taken upon three other pleas:

1st. That the said bond had not the force and effect of a judgment.

2d. That the condition of said bond had not been forfeited.

And 3d. The general plea of *non est factum*.

And upon the trial, a verdict was found for the plaintiff, and judgment rendered thereon, from which the defendant has appealed to this Court.

One of the trustees to whom debts have been assigned to pay creditors may give authority to one of a firm of unsatisfied and prefered creditors to sue for the recovery of an assigned debt for his own benefit without the assent of the other trustee.

A preliminary question was raised in the progress of the case, namely: that the suit was prosecuted without authority from the plaintiffs, or right on the part of Brewster, for whose use it was prosecuted. The Court, upon affidavits, discharged the rule, and permitted the suit to progress, and we are satisfied he did right. The affidavit of Faulkner shows that Lank and Stephens, the plaintiffs, had transferred all their assets to himself and one Pendleton, as trustees, for the benefit of all his creditors, preferring however, in the assignment, the debt due to the late firm

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KELLY vs LANK AND STEPHENS.

of Brewster & Co. and three others; that the debts of two of the other preferred creditors had been paid, and he believed the third had been paid, and the debt to the company of Brewster had not been paid, and that he as trustee, gave authority, and recognized the right of Brewster to sue, as the means of obtaining the debt due to his firm. This affidavit alone is sufficient to authorize the suit in the name of Lank and Stephens. It was not necessary to prove the assent of the other trustee. As Faulkner had the unquestionable right, as one of the trustees of Lank and Stephens, to use their names in the prosecution of suits to collect their assets, so he might give authority to another to use their names, or recognize and give sanction to a suit already instituted. Nor is it any objection to the suit, or to the right to proceed with it by the attornies, that it has been instituted for the *use of Brewster alone*, and not for the use of his firm. The distribution of the fund when collected, is a matter between him and his firm, and cannot affect his right to use the names of Lank and Stephens in the prosecution of the suit, even if he had not made affidavit that upon a dissolution, he was entitled to the whole interest in the debt due them, and for the satisfaction of which he had instituted this suit.

A plaintiff suing upon a forfeited delivery bond given in a sister State, which by the laws thereof has the force of a judgment, is not bound to give oyer—the instrument is in custody of the law: (5 *Coke*, 74, *b*. 76, *a*.; 2 *Bibb*, 330; 2 *J. J. Marshall*, 270.)

It is also objected that profert is not made, nor oyer given of the original forthcoming bond. If the bond had not been raised to the dignity of a judgment by the statutes of Mississippi, but was only made returnable to the Court as a part of the proceedings in the case, the defendant had no right to oyer of the original, nor was the plaintiff bound to make profert of it. It was not in the possession, or under the control of the plaintiffs, but in the custody of the law, and might be inspected there by the defendant as well as the plaintiffs, and that too without the aid of the statute of this State; (5 *Coke*, 74 *b*. 76 *a*.) *Moore's executor* vs *Paul*, (2 *Bibb*, 330;) *Anderson* vs *Barry & Co.*, (2 *J. J. Marshall*, 270.)

Is it a good plea to an action on any bond taken by a sworn officer in the dis-

In relation to the pleas numbers five and seven, it is questionable whether they could be sustained. If the bond should have no other force or effect given to it than an ordinary bond taken by a sworn officer in the discharge of

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an official duty, and returned to the Court as such, in that point of view, it would constitute a part of the return of a sworn officer, taken in the discharge of an official duty, and in the execution of the process of the Court, and the defendant having acknowledged his signature and seal, and to that extent became a party to the proceedings, it may be well doubted whether he could be allowed to contradict, collaterally by evidence in *pais*, the return of the officer.

charge of his official duty to aver that it was delivered as an escrow or in blank on condition.—QUE.

But the bond, by the statute of Mississippi, upon its return to the office as forfeited, is declared "to have the *force* and *effect* of a judgment, and upon which execution may be taken out, as upon a judgment, for the amount of the original execution;" and the question arises, can it be impeached collaterally by evidence *in pais?* We think it cannot. It composes a part of a judicial proceeding in Mississippi, is record evidence of right in the plaintiffs, sanctioned by the return of a sworn and responsible officer, and could not, as we believe, be collaterally impeached by evidence *dehors* the record. While it remains in force unreversed or annulled by any direct mode of proceeding, it is record evidence of right in the plaintiffs, and could only be impeached by evidence of as high a grade as itself. This principle has been frequently recognized and sanctioned by this Court, as well in relation to judgments, decrees and patents from the Commonwealth, as in reference to returns made and bonds taken by officers in the discharge of their official duty, in the execution of the process of the Court. In the case of *Trigg, &c.* vs *Lewis' executor*, (3 *Littell*, 132,) this Court decide that a Sheriff's return that he had sold land taken in execution, and received a sale bond, is conclusive of the fact of sale, the execution of the bond, and who were the purchasers and sureties, unless falsified by a judicial sentence in a proceeding to which the Sheriff was a party. In the case of *Hornbeck* vs *Smith*, it is decided that the return of a Sheriff on a writ of *habere facias possessionem*, is conclusive of the facts returned. And in the case of *Taylor* vs *Lewis*, (2 *J. J. Marshall*, 400,) which was the case of a proceeding in chancery to enjoin a judgment that had been recovered against an in-

Such pleas are not good to an action of debt on a delivery bond which constitutes a judgment of record when forfeited;—such bonds cannot be questioned collaterally by evidence *in pais*. (3 *Litt.* 132; 2 *J. J. Marshall*, 400; 4 *Bibb*, 329.)

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KELLY vs LANE AND STEPHENS.

fant for land, on the return of a Sheriff of service of process on him, when he was out of the county and no process was ever executed, this Court decide that the *return* of service was *conclusive*, and the infant's remedy, if it was false, was against the Sheriff.

The same doctrine is established in numerous other cases. Indeed, if the return of an officer can be impeached collaterally, by evidence in parol, the whole record may be impeached, for the return is often the basis upon which the validity of the entire record rests.

Even in the case of patents, in the emanation of which there is no judicial proceeding, and in which there is but one party and no adversary interests litigated, it being regarded and established as *record* evidence of title, it cannot be collaterally impeached by evidence *in pais*, as was decided by this Court in the case of *Bledsoe's devisees* vs *Wells*, (4 *Bibb's Rep.* 329.)

This Court will presume that the mode of avoiding the force of bonds, matters of record in Mississippi, by a direct proceeding and not collaterally, is the same in Mississippi as in Kentucky.

These being the doctrines in this State, we must conclude that similar doctrines prevail in Mississippi. And if so, then Kelly, if he delivered the bond as an escrow, as alledged in his plea, or when the same was in blank, could only get rid of its force and effect upon him, as a judgment in that State, in a direct proceeding in the Court to which it was returned, to quash or set it aside, or otherwise annul it, or take his remedy against the Sheriff for a false return. If annulled by the judgment of the Court, such judgment being of as high grade of evidence as the bond, which is constituted record evidence of right in the plaintiff, might be relied on to impeach it when proceeded on as a judgment, and no inferior grade of evidence would be competent.

The record and judicial proceedings of States have the same force in every other state where made. *Con. U. S. IV. Art. Sec.* 1; *Story no Con.* 180-1-2-3.

If the bond in Mississippi has the force and effect of a judgment, and record evidence of right in the plaintiff, which cannot be collaterally impeached, has it the same force and effect here? We cannot doubt that it has. Article IV, Section 1st, of the constitution of the United States, (1 *Stat. Laws*,) provides that, "*Full* faith and credit shall be given in each State, to the public acts, *records* and judicial *proceedings* of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall

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be proved and the *effect* thereof." And the Congress of the United States has, in pursuance to the authority delegated in the latter clause of said section, by the act of 26th May, 1790, after providing the mode for authenticating the acts, records and judicial proceedings of the States, declared, "and the said *records* and judicial *proceedings*, authenticated as aforesaid, shall have such faith and credit given to them, in every Court in the United States, as they have by law or usage, in the Courts of the State from whence the said records are or shall be taken."

It follows, that if the *records* and judicial *proceedings* of the State of Mississippi cannot be collaterally questioned there, neither can they be collaterally questioned here. If the bond and return of the officer there is a judicial proceeding, constituting a part of the *record*, and cannot be impeached by evidence *in pais* there, neither can it be impeached, by such evidence here. It is not merely the *judgment* or *decree* rendered in a judicial proceeding, that has the same force and effect given to them, as in the State where they are rendered, but the *records* and *judicial proceedings* in a sister State, are to have the same force and effect given to them that they have by *law* or *usage* in the State from whence the said *records* are or shall be taken: (*3 Story on the Constitution*, 180-81-2-3.

These views apply to, and dispose of, the 2d, 5th and 7th pleas quoted, to which demurrers were sustained by the lower Court. And as to the second plea, it is not a plea of *nul tiel record*, but a plea that there is no such judgment, which was intended, no doubt, to negative the fact averred, that the bond had the force and effect of a judgment here, and it has been so treated by the counsel. The pleas Nos. five and seven, present issues of fact to the country, impeaching the bond collaterally, which, as has been shown, cannot be done.

Matter of evidence being offered and properly rejected under one plea, which might have been offered, and been equally liable to rejection under pleas which were demurred out, presents no ground for a new trial.

But if we should be mistaken in these views, the plea of *non est factum* was allowed and issue taken to the country upon it. Upon that plea the defendant might have availed himself of any defence which he could have relied on under the pleas that were rejected, and did at-

Is the plea of *non est factum* a valid plea to an action on a bond taken by a public officer, which when forfeited has the force of a replevy bond? QUE.

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KELLY vs LANE AND STEPHENS.

tempt to do so. And having failed and a verdict found against him, we should not feel disposed to reverse the judgment merely for the rejection of pleas presenting the same matter of defence. But we would here remark, that we are scarcely prepared to concede that the plea of *non est factum* upon which issue was taken, is less objectionable than the pleas which were adjudged bad. It may have been allowed under the idea that if Kelly had never put his name or seal to the paper returned as a bond, nor had any concern with it or participation in the transaction, that he might rely upon that fact collaterally, to discharge himself from the bond. This obviously would present a hard case, but from the views taken and authorities cited, it is certainly questionable whether he could be allowed to do so, in a defence to this action.

There are two points of view in which perhaps the plea might have been allowable: 1st. Where the Court in Mississippi had no jurisdiction over the subject. 2d. Where there was another person of the same name of the defendant, Kelly, and the bond was not executed by the defendant, but by the other person of the same name. These matters might, perhaps, be relied on under the general plea of *non est factum*. But if they might, they certainly could be presented in more appropriate pleas.

The principal in a delivery bond is not a competent witness to sustain the plea of *non est factum* for the surety—he is incompetent on account of his liability over to the surety for the judgment for costs. (5 *Monroe*, 268; 7 *Cranch*, 206).

The deposition of Ferguson, one of the principals in the bond, was offered in behalf of Kelly and rejected by the Court, which is assigned for error. It was properly rejected on the score of interest, as in principle was decided in the case of *Hunter* vs *Gatewood*, (5 *Monroe*, 268; *Riddle* vs *Moss*, (7 *Cranch*, 206.) The mere fact that Kelly, in making defence to, and resisting the payment of the bond, has pleaded *non est factum* and sworn to it, cannot prevent him from going upon his principal for the debt and all costs incurred in the defence of the action. He was brought into his condition by his principal, and has a right to make any and every defence which his counsel, in the management of his cause, might deem necessary; and if he is defeated and pays the debt and costs, he has a right to recover both from his principal. And if he has, the interest of Ferguson is greater on the

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side of Kelly, by the amount of the costs, than it is on the side of the plaintiffs.

THOMAS vs DAVIS.

The deposition of the Sheriff who took the bond, was objected to by the defendant, and the objection overruled by the Court, and the deposition read in behalf of the plaintiffs, and we think properly. The Sheriff acted as *quasi* agent in the transaction, and as such, was competent as a witness to sustain his return.

A Sheriff who takes a delivery bond, is a competent witness for the plaintiff in a suit on such bond.

Upon the whole, we think there was no error in the proceedings and the judgment is, therefore, affirmed with costs.

Underwood for plaintiff; *Letcher & Tilford* for defendants.

Thomas *vs* Davis.

ASSUMPSIT.

APPEAL FROM THE FAYETTE CIRCUIT.

Case 58.

Practice in suits at law. Notice. Depositions. Evidence.

JUDGE BRECK delivered the opinion of the Court.

October 30.

DAVIS recovered a judgment in an action of assumpsit, the law and facts upon a plea of non-assumpsit having been submitted to the Judge, against Thomas, for two hundred and fifty dollars, and Thomas has appealed to this Court.

Decree of the Circuit Court.

Before we examine the questions involved in the merits of the controversy, we will dispose of some objections to the action of the Court in regard to the admission and rejection of testimony during the progress of the trial.

Exceptions were taken by the defendant to the deposition of Pryor:

1st. That the order for taking it was unauthorized, it not appearing that any affidavit had been filed by the plaintiff, as required by the statute.

Objections to the testimony in the Circuit Court.

2d. That the notice was insufficient.

In answer to the first objection, it need only be remarked, that an order for taking the deposition was granted on motion of the plaintiff, and the presumption is authorized

It is not necessary that a written affidavit should be filed to authorize the Court.

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THOMAS vs DAVIS.

to grant an order to take depositions *secus*, where the application is made to the clerk for a *dedimus* to take a deposition. (7 *Monroe*, 576.)

that it was granted upon the proper affidavit as to the materiality of the witness. It was not necessary that the affidavit should be in writing. The statute requires an affidavit to be filed with the Clerk to authorize him to issue a commission in vacation, when no order of Court has been obtained. Such, we presume, was the case in *Taylor* vs *Bank of Illinois*, (7 *Monroe*, 576,) to which we have been referred.

As to the second objection, we think it is equally untenable.

A notice given at Lexington, Ky., in reasonable time to take a deposition at Natchez, Miss., on the 15th, 16th, 17th or 18th, and taken on the last named day, was held well taken. (2 *J. J. Mar.* 55.)

The notice was to take the deposition "at the office of Lewis Sanders, in the city of Natchez, on the 15th day January, 1845, and if not on that day, on the 16th, and if not on that day on the 17th, and if not on that day on the 18th of the same month." The deposition was taken on the day last named. In view of the distance between the place where the suit was pending and where the deposition was to be taken, the notice running through four days, was not unreasonable: (2 *J. J. Marshall*, 55.) There is no evidence, and we cannot presume that the notice was thus given for the purpose of annoyance or of seeking any undue advantage, but to guard against the failure of the witness, from some casualty, to attend on the first day named.

A party who has procured the rejection of a deposition filed by his adversary, should not be permitted afterwards to read without the consent of the other party.

The Court, we think, was also right in refusing the defendant permission to read the deposition of Jones. It had been filed by the plaintiff and the defendant had excepted to it, and his exceptions had been sustained. He subsequently withdrew his exceptions and avowed an intention to read it upon the trial. The plaintiff stated that he should object to its being read by the defendant; that it had been filed by mistake, and asked leave to withdraw it, which the Court refused. All this transpired before the jury were sworn.

Under these circumstances, the Court properly refused the defendant permission to read the deposition upon the trial. And we may here also remark, that the alledged surprise on the part of the defendant's counsel at this refusal, constituted no sufficient ground for setting aside the order of hearing, or for granting a new trial. As an additional reason why the refusal was no ground for a new

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trial, it appears that the plaintiff's counsel offered to consent to its being read, if he was permitted to amend his declaration. The deposition of Jones purported to have been taken in Mississippi, but without any order of Court or notice.

The proof in the cause.

The testimony as detailed in the bill of exceptions, is substantially as follows: Pryor, in his deposition, states that in the month of November, 1843, he was upon the Pharsalia Race Course, in the State of Mississippi, and heard the plaintiff tell the defendant that if he would take a negro boy the defendant had to New Orleans at the approaching races, and bet him on Lucy Dashwood the day she ran, the plaintiff would go his halves, and pay the defendant two hundred and fifty dollars if he lost said negro on said race; that afterwards, in December, 1843, at the Meterie Race Course near New Orleans, on the day of the race when Lucy Dashwood ran, the defendant called on deponent a few moments before the race, and told him that he had bet the negro boy on the race; that deponent at same time asked the defendant if he considered Davis in, and he replied he did; that Lucy Dashwood ran and won the race.

The plaintiff also introduced George W. Stone as a witness, who testified that the defendant told him that he was willing to settle with the plaintiff and give him his note for $250; that he stated at the same time, he did not consider he owed the plaintiff any thing, but would give his note for $250. Defendant also stated that he did bet a negro boy on a horse race, in which Lucy Dashwood ran in New Orleans, and won $500 on the race, and lost it again. The defendant, afterwards in another conversation, told witness that he did not bet said negro boy on said race. The witness was afterwards called by defendant, and proved that the plaintiff resided in Mississippi, and the defendant in Kentucky.

The plaintiff then read from a printed book, purporting, from its title page, to contain the civil code of the State of Louisiana, and to have been published by authority, the following article:

"ART. 2952. The law grants no action for the payment of what has been won at gaming or by a bet, ex-

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THOMAS vs DAVIS.

cept for games tending to promote skill in the use of arms, such as the exercise of the gun, foot, horse and chariot racing. And as to such games, the Judge may reject the demand when the sum appears to him excessive."

Printed books purporting to be published by authority, and to contain the laws of sister States, are competent evidence to prove those laws. (7 *Monroe*, 576; 3 *B. Monroe*, 363.)

To this evidence in regard to the law of Louisiana, the defendant objected, but the objection was overruled. Under the construction given by this Court, in *Taylor* vs *Bank of Illinois, supra*, and in *Breckinridge* vs *Moore, &c.*, (3 *B. Monroe*, 636,) to our statute of 1809, (1 *Stat. Laws*, 187,) the book from which the article was read, was competent testimony of the laws of Louisiana, and the objection, therefore, was properly overruled.

This was all the evidence adduced by either party upon the trial, and in view of it we think the assumption is authorized, that the defendant did bet his negro boy upon Lucy Dashwood at the race run by her at New Orleans in December, 1843, and thereby won $500. And of the sum thus won, that the plaintiff was entitled to a moiety.

From the defendant's statement to the witness, that he considered the plaintiff in the bet with him, we think it fairly to be inferred that he had reference to the arrangement between them shortly before in Mississippi. It is true the witness does not prove from what he states passed between the parties in Mississippi, that the contract was then closed. But from the fact that the defendant was at the race and making the bet as proposed; from his reply to the witness when asked whether he considered the plaintiff in the bet; and from his subsequent statements, it seems to us the inference is fully authorized, that the bet was made in accordance with a settled previous agreement between the parties. Whether the agreement was finally concluded at the time the witness states the terms were proposed by the plaintiff or afterwards, is not important. It is sufficient that it may be inferred from the testimony and the circumstances, that the bet was made by the defendant, and that he considered the plaintiff in with him, pursuant to an agreement between them.

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If the contract was actually closed in the State of Mississippi, we have no evidence that it was forbidden by the laws of that State. Such a contract, if it had even been a bet between the parties, was not prohibited by the common law, which may be presumed, in the absence of proof of any statutory provision, to be the law of that State in regard to it.

A contract valid by the laws of Louisiana, where it was to be performed, and by the common law, will be enforced in Kentucky.

But if the contract was made in Mississippi, but to be performed in Louisiana, it would be governed as to its validity, obligation and interpretation by the laws of Louisiana, the place of performance. (*Story's Con. Laws*, 233.)

The contract as to the bet upon the race, was performed in Louisiana. The act, as we have seen, was not forbidden, but expressly authorized by the laws of that State. It results, therefore, that the defendant by an operation tolerated by the laws of Louisiana, won for himself and the plaintiff, five hundred dollars. The question then arises, and it is the only remaining question for consideration, whether the judicial tribunals in Kentucky should lend their aid to the plaintiff for the recovery of his moiety of this fund from the defendant?

It is strenuously contended, that as betting on horse racing is prohibited by our laws, that our Courts of Justice should, on that ground, refuse the relief sought. That they are not bound by the law or comity of nations, to enforce a contract which is against the policy of our own laws.

Two individuals jointly bet on a horse race in Mississippi and win $500, one received the money and refused to pay, held that the amount was recoverable by action of assumpsit in Kentucky. It was not money won, but received for the plaintiff's use.

This as a general proposition, is undoubtedly true; but the principle, we think, is not applicable to this case. The plaintiff is not here seeking to recover $250, which he has won from the defendant. He has won nothing from him—made no bet with him. He merely seeks to recover $250 which the defendant has in fact received for his use and benefit. The transaction by which this money was acquired and came into the hands of the defendant, was in violation of no law of Mississippi nor of Louisiana. In view of the laws of those States, it was legally acquired and received by the defendant for the use of the plaintiff. His right to it was absolute and perfect, and to afford him the aid of the laws and tribunals of Kentucky for its recovery, we cannot regard, as con-

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MURPHEY'S H'RS vs MURPHEY.

tended, as in violation of any principle of public policy, or as a judicial sanction of any act denounced as an offence by the laws of Kentucky.

Upon the whole, we perceive no sufficient reason for disturbing the judgment of the Court below, and it is, therefore, affirmed.

Robertson for appellant; *Pindell* for appellee.

MOTION.

Murphey's Heirs and Devisees *vs* Murphey.

Case 59.

APPEAL FROM THE CUMBERLAND COUNTY COURT.

Dower. Security for costs.

November 2.

CHIEF JUSTICE EWING delivered the opinion of the Court.

Case stated.

POLLY MURPHEY, a resident of Virginia, claiming to be the widow of Peyton Murphey, deceased, by her agent, moved the Cumberland County Court to appoint commissioners to assign her dower in the real and personal estate of the said decedent. The heirs and devisees of the decedent appeared and objected to the proceedings on several grounds, two of which only we will notice:

1st. That security for costs had not been given, and their motion requiring security was overruled.

2d. That under the circumstances proven, the Court had no jurisdiction of the case.

A non-resident making a motion in the County Court, where costs may be adjudged against him or her, should be required to give bond and surety for costs.

1st. The statute was intended to secure to defendants the costs which they might be compelled to incur in any suit or judicial proceeding against them, as well as to the officers of the Court the fees for their services, and should be liberally construed, so as to apply to any motion or suit in any form, as a judicial proceeding, in which costs may be incurred or services rendered. We think, therefore, that the plaintiff in this case should have been required to give security for costs.

The County Cts. have no jurisdiction to assign dower, except in cases where the

2d. We also think, from the defence made and facts proven, that the County Court had no jurisdiction of the case. The grounds set up in defence, and the proof adduced to establish them, tend to show, that some twenty

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five years ago, the plaintiff was reputed to be the wife of the decedent, and about that time left his bed and board, and facts are proven tending to show that she was indulging in too great intimacy with other men, and in a short time went to Virginia, where she remained and still remains. That a will was made by the decedent, which was duly established and recorded, and his estate divided by a proceeding in chancery, before this motion was made.

husband died seized, and the right of dower is *admitted* or *not contested*. (4 *Bibb* 462, cited and approved.)

We cannot believe that it was the intention of the Legislature by the act of 1803, (1 *Stat. Laws*, 596,) to confer on the County Court jurisdiction to try such grave matters as those involved in this case, and to settle rights so important, and especially as jurisdiction is given to the Circuit Courts over the same subjects. This Court say, in the case of *Rintch* vs *Cunningham*, (4 *Bibb*, 462,) in giving construction to the said act, "Although its language is general, yet we apprehend, from the very nature of the provision, the power of the County Court was intended by the Legislature, to be confined to the assignment of dower in those cases in which the husband has died seized, and the right of dower is *admitted* or *not controverted*." The reasons given by the Court in support of the construction given to the act, are entirely satisfactory, and are as applicable to this case as to the case then before the Court.

The order of the County Court appointing commissioners to assign dower is, therefore, reversed, and cause remanded, that the order may be set aside and the motion dismissed.

Harlan & Craddock for appellants.

Irvine *vs* Rousseau.

DETINUE.

APPEAL FROM THE JEFFERSON CIRCUIT.

Case 60.

Fraudulent gift of slaves by parol.

CHIEF JUSTICE EWING delivered the opinion of the Court.

November 2.

ROUSSEAU, as the husband of Sarah Ann, formerly Sarah Ann Owen, instituted this action of detinue against

Case stated and judgment of the Circuit Court.

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IRVINE vs ROUSSEAU.

Irvine, for a negro boy slave, by the name of Charles, to which *non detinet* was pleaded, and a verdict found under the instructions of the Court, for the plaintiff. And from the judgment rendered thereon Irvine has appealed to this Court.

Facts appearing on the trial.

Upon the trial of the issue, it appeared that Charles, when an infant, was a sickly child, that he belonged to Nelson R. Owen, the father of Sarah Ann; that he, by parol, gave Charles to his daughter, Sarah Ann, then an infant of eight or ten years of age, if she would nurse and take care of him; that she did nurse and take care of him and he recovered; that afterwards, he was called in the family, Sarah Ann's, as proven by members of the family, but others, who were intimate in the family, had never heard him so called; that he remained in the possession of and under the control of N. R. Owen, as the ostensible owner, during his life, and in the possession of his widow after his death, as his administratrix, until after the execution under which Irvine purchased him had issued, and that she listed him in her inventory, as a part of the estate of her deceased husband. Sarah Ann remained with her father, and mother after his death, until she intermarried with the plaintiff, just before this action was brought. Irvine purchased Charles under execution against the estate of Owen, for a debt originating before the pretended gift of Charles.

A gift by parol by a father to his infant daughter, of a small sickly negro in case she would nurse and raise it, where the possession remains with the donor, is invalid to pass the title as against creditors and purchasers. The gift is directly within the evils contemplated by the 41st sec. of the statute of 1798, (*St. Law*, 1479)

As the father was entitled to the services of his infant daughter, we regard the proposition made by him to her, as purely a gift or intended gift, upon the conditions stated. And as a gift or intended gift, it most clearly cannot prevail, under the circumstances proven, against any creditor or *bona fide* purchaser from the donor, and much less against a creditor whose debt originated before the gift, or a purchaser under his execution, who has a right to occupy his place.

Independent of the provisions of the general statute of frauds and perjuries, under the denunciations of which the gift to the daughter cannot stand or prevail against Irvine, a *bona fide* purchaser for a prior debt, the case comes directly within the evil contemplated and intended to be guarded against by the 41st section of the act of

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1798, (2 *Stat. Laws*, 1479.) That section provides, "And whereas, many frauds have been committed by means of *secret gifts*, made or *pretended* to have been made, of slaves by *parents* and others, who have, notwithstanding, *remained in possession* of such slaves, as *visible owners* thereof, whereby *creditors* and *purchasers* have been frequently involved in expensive law suits, and often deprived of their *just debts* and *purchases*; for prevention whereof, Be it enacted, that no gift or gifts of any slave or slaves, shall be good or sufficient to pass any estate in such slave or slaves, to any person or persons whatsoever, unless the same be made by will duly proved and recorded, or by deed in writing, to be proved by two witnesses at least, or acknowledged by the donor and recorded in the County Court of the county, &c. where one of the parties lives, within eight months after the date of such deed or writing."

It is obvious from the preamble to the section, that the Legislature looked to and intended to guard creditors and purchasers from the precise evil to which Irvine has been exposed, in the case before us.

The gift was a secret gift, or pretended gift, known only to the family; it was made by a parent to an infant daughter, who was living with him and was under his control; he remained in possession of the slave as *visible owner thereof*; yet no deed evidencing the gift, was made or recorded. Such a gift or pretended gift, to give any operation to the statute, must be pronounced absolutely fraudulent and void as to Irvine, the purchaser, and as passing no title, as against him at least, to the donee. The proviso embraced in the 42d section, which confines the operation of the prior section to cases only in which the donors have, notwithstanding such gifts, remained in possession, and not to the gift of such slaves as have, at any time, come into the *actual possession* of, and have *remained* with the donee, &c., does not apply to the case before us, or take it out of the operation of the prior section. To give full force and effect to the operation of the statute, and afford that security and protection to creditors and *bona fide* purchasers contemplated by its framers, the *actual possession* of the donee must have been in-

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tended, an actual ostensible possession distinct from and independent of the possession of the donor, such as may be seen, known and distinguished by any creditor or purchaser, and not a possession held by, through, under or in conjunction with the donor's possession, nor by construction implied from ownership as donee.

Indeed, so careful was the Legislature to afford full protection to *bona fide* purchasers for a valuable consideration, and creditors of the donor, against such gifts, that they have provided in the 43d section, that their interests are not to be affected by such gifts of slaves, until the donee shall have been at least three years in the possession of the slave or slaves, under such gift.

It will readily be perceived from the foregoing views, that several of the instructions asked by the defendant's counsel, with a slight modification as to some of them, should have been given, and the instructions given at the instance of the plaintiff's counsel, were misleading and erroneous.

The judgment is, therefore, reversed, and cause remanded, that a new trial may be granted without the payment of costs, and the appellant is entitled to his costs in this Court.

Guthrie and Duncan for appellant; *Fry & Page* for appellee.

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EJECTMENT.

Case 61.

Riggs, &c. *vs* Dooley, &c.

APPEAL FROM THE MONTGOMERY CIRCUIT.

Descent. Devises. Limitations. Femes Covert. Joint rights and joint and special Devises. Adverse possession.

November 2. JUDGE BRECK delivered the opinion of the Court.

Case stated. THIS was an ejectment for two hundred and ninety five acres of land, lying in the county of Montgomery, in which a verdict and judgment having been rendered against the plaintiffs, they have brought the case to this Court.

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The material facts in the case, in regard to which there is no contrariety in the testimony, are the following:

In 1814, the heirs of John Hardy, viz: Ashford and Henry Hardy, Greenberry Riggs and Ann his wife, Hazle Williams and Mary his wife, and C. T. Hempston and Dorcas his wife, the three *femes* being the daughters of said John Hardy, recovered a judgment in ejectment for two hundred and ninety five acres of land, the tract now in controversy, for which a grant had issued to their ancestor, in 1786, against William Farrow, Sr. and William Farrow, Jr. The value of the improvements having been assessed under the occupying claimant law, a bond was executed therefor by Riggs, and a part of the other heirs, and thereupon a *habere facias possessionem* issued, and Riggs, who had managed the suit, was put in possession, and for himself and co-heirs continued in possession about one year.

The bond for the improvements not having been discharged, an arrangement was then made between Riggs, for himself, and Ashford and Henry Hardy, and William Farrow, Jr., by which it was agreed that the bond was to be set aside, and a judgment to be entered for the improvements, in favor of the defendants in the ejectment. Riggs and the two Hardys were to convey to Farrow their interest in the land, and the judgment to be credited for their proportion thereof, and an execution to issue, and the interest of the other two heirs, Williams and wife, and Hempston and wife, to be sold for the residue. The sale was made accordingly, and Farrow became the purchaser, and in 1817, obtained the Sheriff's deed. He at that time or before, also obtained the possession, and under his purchase from Riggs and the two Hardys, and the Sheriff's deed, claimed and held the land as his own, and he and those claiming under him, continued so to claim and hold it till 1842, when this action of ejectment was instituted, upon the joint and several demise of John R. Riggs, Mary Williams and Dorcas Hempston.

It further appeared, that John Hardy died in the State of Maryland, in 1788, and that at the time of his death, his daughter Mary Williams was the wife of Hazle Williams, and his daughter Dorcas was single, and did

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Riggs, &c. vs Dooley, &c.

not marry till 1792, when she was twenty three years of age, and married Hempston. That Mrs. Williams became discovert some eight or ten years before the institution of this suit, and Mrs. Hempston about one year, neither of whom had ever resided in Kentucky. It also appeared, that besides the five children and heirs before named, John Hardy at his death left a sixth child, his oldest son, John Hardy, Jr., who died in 1793 or 1794, leaving no children, and, so far as appears, intestate.

The Court permitted the Sheriff's deed to be read to the jury, but excluded the execution under which the sale purports to have been made.

Instructions asked by plaintiffs below and refused by the Circuit Court.

Upon this state of fact, the plaintiff moved the Court to instruct the jury, "that if they believed from the evidence, that Mrs. Williams or Mrs. Hempston, or either of them, were *femes covert* at the time their *cause of action accrued*, and so remained, or either of them, up to and within three years before the bringing this suit, the law was for them, or such of them as were such *femes covert*, and so remained up to and within three years before the bringing this suit."

This instruction the Court refused, but gave, on motion of the defendants, the following:

Instruction given for defendants below.

"That if the jury should believe, from the evidence, that Mrs. Williams or Mrs. Hempston, or either of them, were not *femes covert* at the time their title descended or came to them, the law was for the defendants."

There being no controversy as to the facts of the case, the only question is, whether the Court below correctly expounded the law.

Whether the execution under which Farrow purchased the two fifths of the land, was properly rejected as evidence, we need not enquire. If an error, it was not to the prejudice of the plaintiffs. In regard to the Sheriff's deed, the Court was right in permitting it to go to the jury.

To make out *title* by a Sheriff's deed, it is necessary to show the judgment and execution under

In order to entitle the defendants to read and rely upon the deed, for the purpose of deriving title under it, it would have been necessary to have shown a judgment, upon which an execution was authorized to be issued, and also the execution. But the deed alone, without producing

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a judgment or execution, was competent for the purpose of showing how Farrow had held, and the character of his possession. Although the deed, therefore, passed no title, yet as Farrow held and claimed under it, his possession was thereby rendered adverse to the parties whose interest it purported to convey. It is insisted, under the circumstances of this case, that Farrow's possession would not be adverse, or rather, that the statute would not commence running till the parties had notice of the manner of his claiming and holding.

which the sale and deed were made, but is not necessary to show the character of a possession held under the deed.

It is true that Farrow obtained possession in virtue of his purchase from Riggs and the two Hardys, and that the joint tenancy, or co-parcenary between Hardy's heirs, was thereby broken up, and Farrow became a tenant in common with the other two heirs. While he so held, the statute would not commence running, because the possession was not adverse. But as soon as he set up claim in his own right to the whole tract, and claimed to hold against all the heirs, whether with or without the Sheriff's deed, his possession was adverse, and the statute commenced running against the two heirs, who had been tenants in common with him, as soon as they had notice of the adversary holding. After a lapse of twenty years continued assertion of right, adverse holding, according to the principle settled by this Court, in *Farrow's heirs* vs *Edmondson, &c.*, (4 *B. Monroe*, 605,) notice from the commencement of the adverse holding might be presumed. In this case the acts by which Farrow claimed to hold in his own right and against the title of Williams and wife and Hempston and wife, were purchasing their interest at a public sale, (for apart from the execution, there is evidence of such sale,) obtaining and duly recording the Sheriff's deed purporting to convey their title, and openly and publicly claiming and holding the land as his own. After an undisturbed holding in this way for twenty five years, it seems to us it is too late for the heirs, or any of them, to call for proof of actual notice.

The possession of a purchase from one joint tenant or parcener, though held by deed, is not adverse to the other joint owners, until it is distinctly claimed to be for the whole and adverse, and notice received by those jointly interested, when after a lapse of 20 years the right of entry would be barred. (4 *B. Monroe*, 605.)

Besides it has been expressly held that where one tenant in common has been in undisturbed possession for twenty years, in an ejectment brought against him by the co-tenant, the jury will be directed to presume an ac-

If one tenant in common be in the undisturbed possession of land for twenty years, claiming

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RIGGS, &c. vs DOOLEY, &c.

tual ouster, and consequently to find for the defendant: (*Cowp.* 217.) Notice, therefore, of the adversary holding from the commencement of this case, should be presumed, and under the *bar*, complete, unless as contended, the rights of the parties are protected by the *savings* in favor of *femes covert*, in our statutes.

the whole, and ejectment bro't. the jury will be directed to presume an ouster, (*Cowp.* 217,) unless the savings in the statute be available.

The instruction moved by the plaintiff, is based upon the supposition that when the *cause of action* accrues to a *feme covert* during coverture, her right of action is not barred till three years after she becomes discovert. If the saving in the general statute of limitations of 1796, were still in force, as to *femes covert*, the instruction would probably be embraced by it. But the saving in that act was repealed by the act of 1814, (2 *Stat. Laws*, 1144,) which not only reduced the time in which *femes covert*, under the former act, were allowed to sue after they became discovert, from ten to three years, but also restricted the saving to cases where lands had descended or had been devised to *femes covert* during coverture. The act provides that in these two classes of cases, ("and in no other case,") *femes covert* shall be allowed three years only, after they become discovert, to commence their actions, &c. Such was the construction, as we understand the decision, and in which we concur, given by this Court to the act of 1814, in *Masterson's heirs* vs *Marshall's heirs*, (5 *Dana*, 412.) And upon this construction it follows, that the instruction as moved by the plaintiff, was properly refused. It also results from the uncontroverted facts in the case, that the plaintiff was not entitled to recover upon the title which descended to Mrs. Williams and Mrs. Hempston, from their father. No title whatever was shown in the lessor, Riggs. Upon the demise of Mrs. Williams, there could be no recovery, as she had been discovert more than three years. Nor could there be any recovery upon the demise of Mrs. Hempston, as no title descended to her during coverture. In the latter case the question was settled by this Court in *Kendall* vs *Slaughter*, (1 *Marshall*, 377.)

The savings in the statute of 1796, were repealed by the act of 1814, (2 *Stat. Laws*, 1144,) which reduced the time in which *femes covert* might sue, from 10 to 3 years, and restricted the class of cases on which she might sue, to cases where lands had *descended* or been *devised* to *femes covert during coverture*. (5 *Dana*, 412; 1 *Marshall*, 377.)

The instruction which the Court gave the jury, was in effect, that unless Mrs. Williams and Mrs. Hempston both labored under the disability of coverture when the

Where the right descending is a joint right, all

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title descended to them, the law was for the defendants. The law is certainly well settled, that where the right is joint, all must be under disability, to stop the running of the statute. But that rule will not, in all cases, apply to the time when the title descended or vested. There might, at that time, be no adverse possession, and until that was the case, the statute of course would not commence running. The rule must, therefore, apply to the condition of the parties at the time the cause of action accrued. If at that time, the right being joint, a part only were under disability, the statute would run against all and bar all, the same as if all had been free from disability. But even if all were then under disability, still if the disability were coverture, whether it would be available or not, would depend upon whether it existed at the time the title descended or had been devised; for, as we have seen, it is only in that state of case, that the rights of *femes covert*, under the statute of 1814, *supra*, would be protected at all. The instruction, therefore, is not, abstractly considered, correct, nor is it so as applicable to the facts of this case. But we should not have felt authorized to disturb the judgment for the error in regard to it, if the plaintiff had manifested no right to recover except under the title derived by descent by Mrs. Williams and Mrs. Hempston from their father, for as the record now stands upon that title, apart from the instruction, there could legally have been no recovery. But such we apprehend, was not the case in reference to the title which descended to them from their brother; at his death Mrs. Hempston, as well as Mrs. Williams, was a *feme covert*. They were also both *femes covert* in 1817, when their cause of action accrued against Farrow. At that time the estate in co-parcenary, as to the inheritance from the brother, had been dissolved by the previous sale and transfer of the other three parceners to Farrow, which converted the estate into a tenancy in common. Upon the dissolution of the co-parcenary, Mrs. Williams and Mrs. Hempston became tenants in common with Farrow. Technically, as to each other, they may still have continued co-parceners. But whether so or not, is in no view of the case, deemed important. Both were under the same disability

Reece, ad. vs. Dooley, ad.

must be under disability to have the benefit of the savings in the statute, if there be then a right of action, or an adverse holding.

Heirs may demise severally. (1 *Marshall*, 70; 3 *J. J. Mar.* 98.)

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Bacon, adm. vs Dooley, ad.

and they had no co-tenant free from disability. Whether regarded, in reference to their right of action, as tenants in common or as co-parceners, they could undoubtedly sue in severalty: *Scott* vs *Beall*, (1 *Marshall*, 70; 3 *J. J. Marshall*, 98.) As tenants in common they could only sue in that way; and in that view of the case the right of the one would not be affected by the condition of the other, whether under disability or not. Nor would the bar of the one have the effect to bar the other: *Dickey vs Armstrong's devisees*, (1 *Marshall*, 38.) In this light we are disposed to regard them, and hence it would follow, that although Mrs. Williams might be barred, not having sued within three years after she became discovert, Mrs. Hempston would not be.

When all to whom title descends are under disability, all are protected until all the disabilities are removed. (3 *Monroe*, 147.)

But considering them as co-parceners, and both under disability, they could sue jointly, and the question would arise whether either would be barred till three years after both became discovert. In *Clay's heirs* vs *Miller*, (3 *Monroe*, 147,) all were infants when the right accrued, and it was held that they were allowed three years to bring their action, after the whole of them had arrived at the age of twenty one. But that case differed from this in an important particular. In that case the infants constituted one heir, and as such were entitled to the entire estate, but not so here. But even if the same principles were applicable to this case, it would seem that to render it available, the parties must sue jointly. It must be presumed that in the case cited, the lessors still occupied the attitude of a single heir, and as such asserted a joint right. In this case the lessors demise jointly and severally, but as no title is shown in the lessor, Riggs, there could be no recovery, as is well settled, upon the joint demise. Upon the several demise of Mrs. Williams, she could not recover, having been more than three years discovert. Upon such a decision, she could derive no aid from her co-tenant. But the bar of Mrs. Williams could, we think, in no view of the case, affect Mrs. Hempston, who is clearly within the saving of the statute, whether regarded as tenant in common or as a co-parcener.

—Where there is a joint and several demise,

Upon the whole then, we come to the conclusion that upon the facts now appearing in the record, the plaintiff,

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upon the demise of Hempston, manifested a right of recovery to the extent of one fifth of one sixth, or of one thirtieth of the land in controversy. What effect the grant to Sebree should have as to so much of the land embraced by it, we need not enquire.

Morgan &c. vs Lewis &c.

and no joint right is proved, no recovery can be had upon the joint demise, but upon the separate demise so far as title is shewn in the lessors.

It follows also, from the view we have taken, that in regard to the first trial, the verdict was properly set aside, and a new trial granted; but in regard to the last trial, that the Court mis-directed the jury as to the law of the case, and to the prejudice of the plaintiff.

The judgment is, therefore, reversed, and the cause remanded, that a new trial may be granted without the payment of costs, and the plaintiff is entitled to his costs in this Court.

Apperson and Haslerigg for appellants; *Henson and French* for appellees.

Morgan *vs* Lewis, &c.

CASE.

APPEAL FROM THE CLAY CIRCUIT.

Case 62.

Gaming. Action, form of.

JUDGE MARSHALL delivered this opinion of the Court at the fall term, 1845, but being overlooked, was not published in the 6th volume, as it should have been.

Oct. 25, 1845.

WE have no doubt, that any one of several losers at an unlawful game or sport, may, after the expiration of six months, without a joint suit, maintain a separate suit for the recovery of the money or property so lost and paid, as a stranger to the bet might do under the first section of the act of 1833. But the statute, in case property is lost, authorizes the recovery of the property, and not of its value, or damages, unless where the property itself cannot be had. And there being no averment of such a disposition of the property by the winners, that it cannot be had on a judgment against them, case seems to be an inappropriate remedy for the recovery of the property.

Any one of several losers at an unlawful game, may, after lapse of six months, sue for the recovery of the property lost. A stranger can do so under the act of 1833; but not the value of the property unless it cannot be had.

The 20th section of the statute, we understand as allowing debt, detinue or case, as the plaintiff may choose and his case require; he may bring either of the actions

The statute allows debt, detinue or case, as the case re-

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Morgan vs Lewis, &c.

quires; in selecting the remedy the appropriate action must be selected.

which is appropriate to the case; but it does not authorize him to bring one, which according to the established form of proceeding and judgment therein, would be wholly inappropriate, and inadequate to the relief given by the statute.

—Though *debt*, being given by a former statute might be maintained for *money* or *property*, or detinue, or case, where the facts justified——the mere failure to deliver property will not justify bringing case.

Debt being given by the former statute in all cases, and not taken away by this in any. Debt might be maintained for money and property, or detinue for property, or case when by reason of any act beyond the mere winning and recovering of the property, damages may be recoverable. But the mere failure to deliver it to a person who afterwards sues as plaintiff in a popular action, does not convert the demand for the property into one for damages.

We are of opinion, therefore, that the declaration in this case was properly adjudged bad upon the demurrer, and the judgment is affirmed.

Goodloe for appellant.

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JUDGES OF THE COURT OF APPEALS.

Since the last term of this Court, the Hon. Ephraim M. Ewing, Chief Justice of Kentucky, resigned his commission; the Hon. Thomas A. Marshall was promoted to the office of Chief Justice of Kentucky, and the Hon. James Simpson was commissioned a Judge of the Court of Appeals. The Court now consists of

Hon. THOMAS A. MARSHALL, *Chief Justice.*

Hon. DANIEL BRECK,
Hon. JAMES SIMPSON, } *Judges.*

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DECISIONS

OF THE

COURT OF APPEALS

OF KENTUCKY.

SPRING TERM....1847.

Commonwealth *vs* Stout, &c.

INDICTMENT.

ERROR TO THE JEFFERSON CIRCUIT.

Case 63.

Indictment. Emancipation of slaves.

JUDGE SIMPSON delivered the opinion of the Court.

June 9.

Case stated.

In 1840 an act was passed to amend the laws regulating civil proceedings, and for other purposes, which contains a section, subjecting to a fine of not less than $500, nor more than $2,000, any person or persons, who shall remove, or attempt to remove from this Commonwealth, any person of color, having a suit pending for freedom in any of the Courts of this Commonwealth.

The indictment in this case was found under this statute, and charges that the defendants attempted to remove from the Commonwealth of Kentucky, Nancy, a person of color, having a suit pending for freedom in the Louisville Chancery Court. The knowledge of the defendants of the pendency of the suit for freedom is not alledged, and the first and most important question is, as to the necessity of such allegation to the validity of the indictment.

A proper construction of the statute is first necessary to enable the Court to arrive at a correct conclusion on this point.

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COMMONWEALTH vs STOUT, &c.

Was it intended by the Legislature by this enactment, to subject to punishment the act of removal, or attempt to remove, in such cases, whether knowledge of the pendency of the suit for freedom, did or did not exist?

The evil that the Legislature intended to guard against, by the passage of this law, was the removal of persons of color from this State, with a view to prevent the successful prosecution of a suit instituted by them for their freedom. The effect intended to be produced by the act of removal, necessarily implies a knowledge of the existance of the suit for freedom, and a desire to defeat its object. To give such an exposition to the statute as to make a knowledge of the pendency of the suit for freedom essential to its violation, would be, therefore, entirely consistent with the intention of the Legislature, and the object contemplated by it in its passage.

To place a construction upon the statute which would make it apply to every removal, or attempt to remove, a person of color, during the pendency of a suit for freedom, without reference to the knowledge of the party, would involve the innocent as well as the guilty. In determining the meaning of penal statutes, care should be taken to give to them a construction that would not necessarily lead to this result. Persons of color, under our laws, are held in slavery; they are the subjects of sale and transfer, and individuals may purchase and remove them, even during the pendency of a suit for their freedom, without any knowledge that in so doing, they are acting illegally.

It is necessary, in an indictment under the statute of 1840, (3 *Stat. Laws*, 225,) for removing or attempting to remove any person of color having a suit depend'g for freedom, to aver that the defendant had knowledge of the pendency of such suit.

As the bare attempt to remove is embraced by this law, as well as an actual removal, it is obvious that the knowledge of the pendency of the suit for freedom, and a desire to defeat it, by the removal of the plaintiff in the action, was the case contemplated by the Legislature and designed to be punished. For these reasons we have come to the conclusion that to the commission of the offence under this statute, knowledge of the pendency of the suit for freedom is requisite.

Where the statement of an act

An indictment must contain a certain description of the offence of which the defendant is accused, and a statement of the facts by which it is constituted. Where the

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statement of the act itself, necessarily includes a knowledge of the illegality of the act, no averment of knowledge or bad intent is necessary. But where such is not the case, knowledge must be alledged and proved. Thus it has been held, that in indictments for uttering forged tokens, or other attempts to defraud, or for receiving stolen goods, and offences of a similar description, a positive averment of knowledge is essential: (1 *Chitty's Crim. Law*, 242.)

itself necessarily includes a knowledge of the illegality of the act, no averment of bad intent is necessary. (1 *Chit.* 242.)

An indictment in the words of a statute, is not always sufficient. Whether sufficient or not, depends upon the manner of stating the offence in the statute. If every fact necessary to constitute the offence, is charged, or necessarily implied by following the language of the statute, the indictment in the words of the statute, is undoubtedly sufficient, otherwise it is not. Here the averment of the attempt to remove the person of color, during the pendency of a suit for freedom, does not necessarily imply a knowledge of the existance of such suit; and consequently this indictment is insufficient on account of the absence of this allegation.

Stating an offence in the words of the statute is not sufficient, unless every fact necessary to constitute the offence is charged or necessarily implied by following the words of the statute.

Under this opinion of the Court, it is unnecessary to notice the other questions presented in the record. The judgment of the Circuit Court being in favor of the defendants, although on another point in the cause, is such a judgment as should have been rendered on account of the insufficiency of the indictment.

Wherefore, the judgment of the Circuit Court is affirmed.

Cates, Attorney General, for Commonwealth; *Loughborough, Thruston and Lindsey* for defendants.

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MOTION. **Commonwealth, for Richardson *vs* Cole, and others.**

Case 64. ERROR TO THE ESTILL CIRCUIT.

Constables. Official liabilities.

June 11. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated. THIS is an action against a Constable and his securities, to recover for alledged breaches of the official bond of the Constable. Two breaches are alledged, and each having been adjudged insufficient upon demurrer, and a judgment having been rendered for the defendants, the sole question in this Court, is upon the sufficiency of the declaration.

A declaration on a Constable's bond merely averring that the def't. by color of his office of Constable, collected money from the relator, without further averment is insufficient. The first breach is, that "the relator was compelled to pay to said Cole the sum of $95, which Cole, by color of his office as aforesaid, wrongfully collected from the said Richardson and refused to account for," &c. There being no allegation of fact to aid the general phrases used in this statement, we are clearly of opinion that it is too vague and indefinite to answer the purpose of a declaration. It does not appear how the relator was compelled to pay, nor what was the particular act complained of, and the statement furnishes to the Court no means of determining whether the collection was by color of office or not. Nor does it furnish to the defendants the requisite information of the charge or complaint relied on. It is a mere statement of legal conclusions or inferences, without the facts on which they are founded, and was properly adjudged insufficient.

The second breach is, that the defendant, Cole, while he continued to act as a Constable, "represented to the relator that he had various executions in his hands against him for collection, from the office of A. McMonigal, a Justice, &c. (which are specified,) and the relator well knowing that judgments had been rendered against him by said McMonigal, on which such executions might issue, paid said Cole, at different times, the whole

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amount of said executions. But to return said executions satisfied, as said Cole was bound by law, he did not. In consequence of which misconduct, and breach of duty in office, the relator afterwards, to-wit: on &c. was compelled to pay the judgments aforesaid; but that neither Cole nor any of the defendants have paid back or accounted for the amount of said judgments," &c.

A declaration against a Constable and sureties for collecting money under pretence of having executions agst. the plaintiff, and failing to return said executions satisfied, without any averment that he had executions in force at the time of the receipt of the money, is not sufficient to charge the sureties.

Here is no averment that Cole had in fact any of these executions in his hands, either at the time of his representations, or at the time of payment to him, but only that he represented that he had them. There is therefore no breach of that part of the bond, which provides for the due execution and return of process, and for payment of money collected on process. And the only question is, whether the declaration shows a breach of that part of the condition of the bond, which provides that the Constable "in all other things shall faithfully execute and perform the said office of Constable according to law."

To charge Constable *and his sureties* on his official bond, the act complained of must not only be one which might be rightfully done as Constable; but done by him as Constable under claim of right to do it as such.

Conceding, as we are disposed to do, that this clause of the condition should receive a most liberal construction, for the protection of the community against fraud, extortion, and every form of oppression incident to an abuse of the official character and powers of a Constable, still there must be some reasonable limits to its operation. It cannot cover all acts which the individual may do, while he holds the office of Constable, nor even all acts which in their nature pertain to the office, and might under proper circumstances, be rightfully done by a Constable. The act must not only be of this nature, but it must at least be done by him as Constable, under claim of a right to do the act by virtue of his office. And so far as it implies acquiescence or co-operation in the party injured, this acquiescence or co-operation should be induced by a confidence in the official character and right as asserted.

As an individual he may be liable for many acts while acting as Constable, for which his sureties would not be responsible.

It is to be recollected, that the question is not how far the Constable may be individually responsible for his own acts, but how far his securities may be responsible for them. As by executing the official bond with him, they have not only evinced their confidence in his capacity and other qualifications for the office, but have enabled him

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COMMONWEALTH vs COLE, &c.

to assume the character and rights belonging to it, they may perhaps be justly held responsible for such acts within the general range of his powers, as (though without legal authority in the particular instance,) he does in the name and by color of the office, and of the rights incident to it; but for acts which in their nature are wholly beyond the office, or for acts which though within the general powers of the office, are neither actually authorized in the particular case, nor pretended to be done in virtue of official authority: that is, for acts done as a private individual, they cannot be made responsible on the bond.

The case stated in the declaration is, that while Cole was acting as Constable, he represented that he had in his hands for collection, certain executions against the relator, which he might well have had in that character, and that the relator at different times afterwards, paid to him the whole amount of said executions, &c. It is not expressly averred that Cole was Constable at the time of making this representation. And conceding this to be necessarily implied, or sufficiently expressed, and also, that it is sufficiently expressed, that he represented the executions to be in force at the time when the representations were made, it is not stated, and does not appear even by implication, that any payment was made at the time of such representation, or under a claim at the time, of any right to coerce or receive payment, (as Constable,) by virtue of executions in hand; or that it was made under a belief that there was such right. It is not averred either, that the executions mentioned were, or that they were not actually in the hands of Cole when he made the representations. For all that appears, his representation may have been true. He may have had the executions in his hands in full force when he said he had. He may have made true and timely returns of them or not, and he may have received the money either after the actual return, or after the executions had expired, and when he neither had nor pretended to have the right of coercive collection. This may be true, and yet all the facts stated in the declaration may be true. Moreover, it is not stated that the payments were made to Cole as Constable.

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They may have been made, knowing that he had no right to collect as a Constable, and upon his promise to make proper disposition of the money in discharge of the judgments.

We think, therefore, the declaration does not show an exaction in the official character, or by color of the office of Constable, nor any breach of duty secured by the bond. Certainly it does not show a false return or a failure to return process in his hands, or to pay money collected on process. And we are of opinion that it does not sufficiently show a wrongful collection under color of his office, or under pretence of official right, either asserted or confided in. For the non-payment of money unless received either rightfully or wrongfully, under color of official right, there can be no responsibility on the bond. The declaration is, consequently, insufficient in the statement of the second as well as of the first breach.

Wherefore, the judgment is affirmed.

Turner for plaintiff; *B. Y. Owsley* for defendants.

Crawford's Heirs *vs* Kenley, &c.

MOTION.

ERROR TO THE GARRARD CIRCUIT.

Case 65.

Costs. Non-residents. Practice.

JUDGE BRECK delivered the opinion of the Court.

June 11. Case stated.

AT the August term, 1845, of the Garrard Circuit Court, on motion of the attorney of E. B. and Ephraim Smyth, who were sureties in a bond for costs for Crawford's heirs, lessors of the plaintiff in this action of ejectment, a rule was made upon them, or the plaintiffs in the ejectment, to give counter security on or before the calling of the cause at the next term, otherwise that their suit would be dismissed.

At the February term following, the plaintiffs having failed as required, to give counter security for the indemnity of the Smyths, the rule was made absolute and the suit dismissed without prejudice.

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CRAWFORD'S HS. vs KENLEY.

To reverse that order or judgment, this writ of error is prosecuted.

Had the order been made as recited therein, on motion of the *defendant's* attorney, we should have been inclined to regard it as an interference between the plaintiffs and their sureties, wholly unauthorized; a motion which the defendants had no right to make, and on that account erroneously sustained. But it appears from the bill of exceptions taken in the case, that the motion was made by the counsel of the defendants and for the sureties, which relieves the case from the objection otherwise apparent upon the face of the order.

In the case of *Crawford's heirs* vs *Robert Logan*, decided at the last term of this Court, a doubt is expressed in the opinion, whether sureties in a bond for costs could be relieved by this mode of proceeding, except under extraordinary circumstances. The grounds upon which the rule in this case was granted, do not appear, and no question, therefore, arises as to the propriety of granting it, unless upon the principle that under no state of case it would be authorized, which we are not prepared to admit. But upon other grounds, we think the rule was prematurely and erroneously enforced. The rule was made absolute and the suit dismissed under the following circumstances:

A surety for costs for a non-resident plaintiff moved the Court to that effect, and had a rule on the plaintiff to give other surety on or before the calling of the cause at the next term. On the calling of the cause, the plaintiff alledged that the surety had been indemnified, and had agreed to continue as surety; but that he, though he had promised to be in Court and consent, from

The counsel for the plaintiff resisted the motion upon the ground that E. B. Smyth, one of the sureties, was alone amply good as surety for the costs, and that since the rule was obtained he had been fully and satisfactorily indemnified as to the suretyship, and had expressly agreed to continue as surety. That he had so agreed since the commencement of that term of the Court, and had promised to be in Court at the calling of the cause, and give his consent to that effect; but for some cause, unknown to the counsel, he was not present. This statement of counsel, as he offered to verify it by affidavit, but the defendants did not require it, is entitled, we think, to the same consideration as if so verified. Under such circumstances the counsel for the plaintiff asked the indulgence of the Court until next morning, with an avowal if Smyth should not then appear and consent to continue,

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surety, he would then give other ample surety or dismiss the case. The Court refused to grant the indulgence sought, made the rule absolute and dismissed the case.

some unknown cause was not present——asked until next morning to have him present, and the Court refused.—Held that the Court abused its discretion.

There appears to have been no question as to the entire sufficiency of Smyth as surety. The motion came up in the after part of the day. Some other facts are stated in the bill of exceptions, but which do not materially change the aspect of the case as already presented. We are of opinion the indulgence asked was, under the circumstances, reasonable, and should have been granted, and that the Court erred in refusing it and rendering the rule absolute and dismissing the suit.

Wherefore, the order and also the judgment for costs is reversed, and the cause remanded for further proceedings.

Bradley for plaintiffs; *Turner and Harlans* for defendants.

Kemper *vs* Hughes.

CHANCERY.

APPEAL FROM THE GARRARD CIRCUIT.

Case 66.

Vendor and vendee. Exchange of lands. Election.

JUDGE BIBB delivered the opinion of the Court.

June 11.

Case stated.

HUGHES exhibited this bill in chancery, seeking a rescission of a purchase of land, which he had made from Kemper, upon the alledged ground of Kemper's inability to convey the title according to the contract, and of fraudulent representation by him in regard to his title at the time of the sale.

Kemper, in his answer, denies all the allegations of fraud, and they are wholly unsupported by testimony. He sets forth his title, relies upon its validity and resists a rescission of the contract between him and complainant.

The Court below set aside the contract and decreed the relief, and Kemper has appealed to this Court.

The land in controversy consisted of two tracts, one containing sixty nine and the other fifteen acres. To the

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KEMPER vs HUGHES.

larger tract Kemper claimed to have derived title under a deed from Samuel Bixler and wife, to the latter of whom the land had been devised by her father. The validity of his title to this tract turns exclusively upon the conveyance from Bixler and wife, as it is very satisfactorily shown that their title or the title of Mrs. Bixler, was good and free from doubt. The deed purports to have been made in consideration of fourteen hundred and sixty dollars, but it appears from the answer of Kemper and the evidence in the cause, that the consideration was one hundred and three acres of land, which he caused to be conveyed to Mrs. Bixler, and $200 in money. It is insisted on the part of the appellee, that the transaction amounted to a mere exchange of lands with her, and as such was not binding upon her. But whether it should be so considered, and if so, whether the consequence would follow as contended, it will not be necessary here to decide, as we are of opinion her deed to Kemper is not legally authenticated so as to pass her title. Her acknowledgment was taken before two Justices of the Peace of the county of Garrard, where all the parties resided and where the land was situated.

Two Justices of the Peace of the county where the land lay, and the grantors resided, have authority to take the acknowledgment of deeds of *femes covert*, but their certificates must be under *their hands and seals*, otherwise it was defective.

That mode of authentication is authorized by our statutes regulating conveyances, by the act of 1785 and also by the act of 1796, but both the acts require the certificate of the acknowledgment, privy examination, &c. to be returned by the Justices *under their hands and seals.* Their certificate in this case is not in conformity with that requisition. No seals are attached to their signatures and on that account it is deemed fatally defective. The requisition in each act is imperative, and we are constrained to regard a compliance with it as essential to a valid authentication. We are aware of no authority which would authorize it to be dispensed with.

It follows, from this view of the case, that the appellant failed to show title, and consequently, that the Court below was right in decreeing a rescission of the contract between the parties.

But another view of the case is presented by the appellant, upon which he relies.

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Husband and wife sold land which was the wife's by inheritance, and made a deed, which ineffectual to pass her title, the wife took possession, died in possession of the land received in exchange, and willed it to her children, on bill filed by the purchaser for a confirmation of title Chancellor upon a willingness expressed by some of her heirs, who were adults, should hold up the case and put the others upon their election to confirm or avoid the contract when of full age.

After setting forth in his answer the trade with Bixler and wife, or rather with Mrs. Bixler, he alledges that she and her husband had taken possession of the one hundred and three acres of land, which he had caused to be conveyed to her; that she afterwards died upon it, leaving a will, by which she devised it to her children. That her husband had subsequently died, and that a part of her children were still in possession claiming the land. He further alledges, and it very satisfactorily appears from the testimony, that the trade or exchange with Mrs. Bixler, was a very favorable one for her and her children. He makes his answer a cross bill against the devisees or heirs of Mrs. Bixler, and prays, if his title should be deemed defective, a confirmation of it, and for general relief. Mrs. Bixler it appears, left eleven children, two of whom answered as adults, and the residue as infants, by their guardian *ad litem*. The former admit that the trade between their mother and the complainant, Kemper, was an advantageous one for her and her children, and express a willingness for its confirmation, and offer to release all their interest and title to the land attempted to be conveyed by their mother to complainant. In the answer of the infants it is also stated that they admitted the trade was an advantageous one for their mother, and they suppose it would be to their interest that it should be confirmed. The Court below dismissed the cross bill absolutely, and we think erroneously. It is true, as the contract and deed between the complainant and Mrs. Bixler were void on her part, the Chancellor would have no power to confirm it on the part of her infant heirs. They could give no consent, certainly none which would be obligatory upon them. It would, in effect, be a new contract between the parties, which infants could not make, and which the Chancellor would have no authority to enforce. But as to the adults, we think the Chancellor might properly rule them to an election whether they would keep the tract conveyed to their mother or surrender it and take the other; and upon their failure to elect, decree a release of their title to the complainant. The absolute dismissal of the cross bill was, therefore, erroneous. As to the adults that answered, at the instance of

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SNOWDEN vs McKINNEY.

the complainant; it would have been proper to have decreed that they convey and release all their title to the land embraced in their mother's deed to the complainant. The Court might also, at the complainant's instance, have retained the case with a view to rule the infant heirs, as they might become of age, to an election.

Regarding the transaction between Mrs. Bixler and the complainant, as the facts, we think, authorize it to be considered, as a mere exchange of lands, it would be most iniquitous for her heirs to hold both tracts. And the power of a Chancellor to interpose, should such an effort be made by them, can hardly be doubted; and hence in any view of the case, the cross bill should not have been dismissed absolutely.

The decree must be affirmed, except so far as it dismisses the cross bill, and to that extent it is reversed, and the cause remanded, that such relief may be decreed the complainant, should he desire it, as to the adult heirs, and the cause retained as to the infant heirs of Mrs. Bixler, as herein indicated, or otherwise dismissed without prejudice.

The appellee, Hughes, will be entitled to his costs, but upon the reversal as to the cross bill, the parties thereto will each pay their own costs.

McKee and Letcher & Tilford for appellant; *Bradley* for appellee.

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EJECTMENT.

Snowden *vs* McKinney.

Case 67.

ERROR TO THE ESTILL CIRCUIT.

Ejectment. Notice to quit. Sales of land. Champerty.

June 11. JUDGE SIMPSON delivered the opinion of the Court.

Case stated. THIS is an action of ejectment, brought against the defendant in the execution, to recover the possession of land sold by the Sheriff.

The main question presented is, as to the necessity of notice to the defendant, to surrender the possession of the

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land to the purchaser, previous to the commencement of his action.

A purchaser of land under execution is entitled to immediate possession; the defendant in the execution is not a tenant or *quasi* tenant of the purchaser, and therefore is not entitled to notice to quit.

The purchaser under an execution having received a deed from the Sheriff and obtained the legal title, has an immediate right of entry on the land. The defendant in the execution does not stand in the relation of tenant, or *quasi* tenant to the purchaser. It is only where possession has been taken, or at least retained by the consent of the owner of the land, that he has no right of entry, and that the person in possession is not regarded as a wrong doer until he has been notified to quit, or a demand has been made on him to restore the possession, which he has refused to comply with. Although the possession of the defendant in the execution is an amicable one, and consistent with the title of the purchaser, yet he is under a legal obligation, whenever the purchaser's title is perfected, to surrender to him the possession of the land, the right to which he has acquired by his purchase. And, therefore, the defendant in the execution is not entitled to notice to quit, nor is any demand of the possession by the purchaser requisite, before he brings his action.

The vendee of a purchaser of land sold by a Sheriff under execution, is entitled to all the rights of his vendor, and the same remedies to obtain the possession, his purchase is not within the laws against champerty.

It follows also, from this reasoning, that there is no weight in the objection made to the title of the lessor of the plaintiff, who is not the purchaser at the Sheriff's sale, but his vendee, that the deed to him is champertous and void. It does not result as a consequence, that because the possession of land is of such a character as not to require notice to quit, that therefore it must be deemed adverse. It has been held by this Court in the case of *Griffin, &c.* vs *Dicken*, (4 *Dana*, 561,) that when the vendor of land remained in possession after he had made a sale and conveyance, a deed made by the purchaser passed the title to his vendee, and was not champertous, because the possession so held should be deemed consistent with the title, and not hostile to it. The defendant in execution remaining in the possession of land after a sale and conveyance by the Sheriff, must be regarded, particularly (as is the case here,) in the absence of all testimony manifesting the actual character of his possession, as holding in the same way, and a sale and con-

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Snowden vs McKinney.

veyance by the purchaser as passing the title to the vendee.

That a Circuit Judge refused to instruct the jury to find as in case of non-suit, and remarked "that the evidence entitled the plaintiff to a verdict" not available error; if he had been called on for an instruction it should have been given hypothetically, predicated upon the belief of the evidence.

The Circuit Judge did not, as is assumed by the assignment of error on that point, instruct the jury that the evidence entitled the plaintiff to a verdict. In passing on the motion of the defendant to instruct, as in case of a non-suit, he decided that the evidence entitled the plaintiff to a verdict, and overruled the defendant's motion. As the evidence before the jury clearly authorized a verdict for the plaintiff, there was nothing wrong in this decision, although had it been given to the jury as an instruction, it should not have been given absolutely, but hypothetically, on their belief of the evidence.

In ejectment the demise was laid on the — day of —, 1844, the title proved commenced on the 20th March, '44, which was before suit was brought. The evidence should be so understood as to sustain the verdict rather than to defeat it.

The demise is laid in the plaintiff's declaration, as having been made on the blank day of blank, 1844. The deed to the lessor of the plaintiff was executed on the 20th day of March, 1844, and it is contended that inasmuch as the plaintiff failed to fill up the blank with a date subsequent to the time when he acquired his title, that a construction which is least favorable to him, should be given to the declaration; and such as would show that he had no title at the date of the demise. To give it such a construction would be entirely arbitrary, and tend to defeat, instead of promoting the ends of justice. Having shown the commencement of his title, if the date of the demise is to be fixed by construction, that would be most reasonable which should fix it at a period when the title would have authorized it to have been made. Such a construction would also have the additional recommendation of aiding in the support of a claim fully sustained by the evidence adduced on the trial.

Wherefore, the judgment of the Circuit Court is affirmed.

Turner for plaintiff; *Caperton and Owsley* for defendant.

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Russell *vs* Wilson.

CASE.

APPEAL FROM THE MONTGOMERY CIRCUIT.

Case 68.

Slander. Words.

JUDGE BRECK delivered the opinion of the Court.

June 14.

Case stated.

THERE is no material variance between the words proven upon the trial and as laid in the declaration; but we are of opinion the words proven, or which the testimony conduced to prove, were insufficient to sustain the plaintiff's action.

The testimony conduces to prove that the defendant made this declaration: that Wilson held Foster's horse whilst Foster knocked defendant off his horse, put his hand in his pocket, and said the damned old rascal had no money, and he would take his tobacco for his trouble; that one held while the other skinned. These words are substantially laid in the declaration, with an inuendo that the plaintiff and Foster assaulted with an intent to rob the defendant of his money, and finding no money, they picked his pockets and robbed him of his tobacco.

To say that 'Wilson held Foster's horse whilst Foster knocked the defendant off his horse, put his hand in his pocket and said the damned old rascal had no money, and he would take his tobacco for his trouble: The one held while the other skinned,' is not actionable—importing the commission no felony.

The words do not import an actual robbery of either money or tobacco. The declaration that Foster said, finding no money, he would take his tobacco for his trouble, does not necessarily imply that he did actually take the tobacco. Foster might have made the remark as stated by the defendant, and still have left his tobacco in his pocket. If the words then, do not import an actual robbery, are they actionable, as importing an attempt to rob? We think not. An attempt to rob was not a felony at common law. The question then arises, whether the words as proven, present a case within our statute, (2 *Stat. Laws*, 1281,) for the punishment of assaults, with intent to rob. The statute provides, "if any person or persons, with an offensive weapon or instrument, unlawfully and maliciously shall assault, or shall by menaces, or in or by any forcible or violent manner, demand any money, goods or chattels of, or from any other per-

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WARNER vs EVERETT.

son or persons, with a felonious intent to rob or commit robbery upon such person or persons, such offender, his aiders, abettors, &c., shall undergo a confinement in the jail and penitentiary, &c.

The first clause makes the offence consist of an unlawful or malicious assault with an offensive weapon or instrument with a felonious intent to rob. The offence in the second clause consists, by menaces, or in or by any forcible or violent manner, of a demand of any money, goods or chattels of or from any other person or persons, with a felonious intent to commit a robbery upon such person or persons. The words in this case do not import an assault with an offensive weapon or instrument, nor do they import a demand as required to constitute the offence under the second clause. The words, if true, therefore, would not constitute an offence under the statute.

It follows that the Court below erred in not sustaining the motion for a nonsuit.

The instruction given to the jury, we think, was also erroneous. It was the province of the Court, and not the jury, to decide upon the import of the words, which the testimony conduced to prove.

The judgment is therefore reversed, and the cause remanded, that a new trial may be granted, without the payment of costs.

Apperson for appellant; *Peters* for appellee.

CHANCERY.

Case 69.

Warner *vs* Everett, &c.

APPEAL FROM THE MONTGOMERY CIRCUIT.

Attachments in Chancery. Mortgages. Frauds.

June 14.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

IN the year 1841, Everett filed his bill in chancery, and sued out an attachment thereon, against James Warner, alledging that the defendant was indebted to him by note, in several sums of money, and that he held on him two debts secured by mortgages, one of which had been executed by

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him to Ellis & White, the other to Ellis alone; the benefit of both of which he claimed by assignment from the mortgagees. Both mortgages embraced the slaves Maria and her child, and no other property. He charged in his bill that he believed the defendant, Warner, would sell, convey, or otherwise dispose of said slaves, with the intent to hinder, delay and defraud him in the collection of his debts, unless prevented by attachment—and he also made the mortgagees, Ellis and White, defendants.

By virtue of Everett's attachment, the Sheriff took the slaves, Maria and her two children, she having been delivered of another child after the date of said mortgages, and Warner having failed to execute bond for their delivery, the Sheriff kept the possession of them, and handed them over to a bailee.

Afterwards, on the 19th of January, 1842, the defendant, James Warner, executed to his brother Joseph Warner, a bill of sale for the three slaves, at the price of $750, to be paid, by first discharging the debts secured by mortgage on the slaves, and the balance to be applied to the payment of execution debts for which Joseph Warner was bound as James Warner's security.

During the pendency of the chancery suit, Everett instituted an action at law, upon one of the debts secured by note, which he had set up and claimed in his bill, and having obtained a judgment and sued out an execution, had it levied on the slaves Maria and her children, and became himself the purchaser of them, at the price of $182 36 cents, at a sale under the execution, made by the Sheriff.

This execution did not issue until some time after the sale made by James Warner to his brother Joseph. The slaves were held by the Sheriff under the attachment, when both the sales were made.

Besides the mortgage debts claimed by Everett, there were three other mortgages on said slaves, at the time that Joseph Warner purchased them from his brother, one given to William White, which is elder than either of the others, one to Walker Chambers, and the other to Daniel Walker; the mortgages transferred to Everett being junior in date to all the others.

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WARNER vs EVERETT.

Joseph Warner having after his purchase of the slaves, paid to William White the greater part of the debt due to him, obtained from him an assignment of his mortgage, and in 1843, filed his bill in chancery, setting out all these facts, making Everett and the mortgagees, and Jas. Warner defendants, and claiming the right to redeem and hold the slaves by paying the debts remaining due on the several mortgages.

These suits were consolidated and heard together, and a decree rendered directing a sale of the slaves for the payment of all the debts secured by the mortgages, and also the debts due to Everett, not embraced by the mortgages.

Questions arising in the case.

Two questions present themselves for our consideration:

First: Has Everett shown himself entitled to a decree for the debts not secured by mortgage.

Secondly: Is the purchase made by Joseph Warner from his brother, legal and valid.

If Everett's attachment can be sustained, it must be on the ground that by making a sale of the attached property, after the institution of the suit, and during its pendency, an inference arises that an intention existed when the suit was brought, to make a fraudulent disposition of the property. If the sale be in itself fair, and made for the purpose of paying debts, and the proceeds so appropriated, it not being fraudulent when made, cannot by any fair process of reasoning, authorize the conclusion of a previous fraudulent intention.

A presumption is attempted to be raised against its fairness, upon the ground that the bill of sale recites the liability of Joseph Warner as security in executions, when two of the debts afterwards paid by him, the one due to F. W. Allen and the other to McNeil and Thomas, had not then been replevied by him as security. But it appears that for these two debts, he was security upon the notes; that execution had issued upon one and was in the hands of the officer, and although no judgment had been obtained on the other, process had issued upon it, and been executed upon him and his brother. He was

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thus as security, liable for both these debts at the time, and the recital in the bill of sale is substantially true.

To sustain an attachment in chancery, it is necessary to show a fraudulent intent before the suing out of the attachment; to prove it to have originated afterwards will not do.

The evidence, so far from justifying Everett in suing out the attachment, shows that the defendant, James Warner, had, at the time that Everett's suit was brought, other property which he kept in his possession for some considerable time, not evincing any disposition to secrete it, or to place it out of the reach of his creditors, although debts were constantly pressing him, and his property was all exhausted in about a year after Everett had brought his suit against him. No single act or declaration is proved to have occurred before the suit was brought, that would tend to show the existence of a fraudulent intention to place his property beyond the reach of his creditors. He was no doubt very much involved in debt, even beyond his means of payment; but that fact did not, of itself, justify a creditor to sue out an attachment, and thus attempt, by a perversion of the object of our statute which authorizes this manner of proceeding in cases where fraud is contemplated, to obtain an undue advantage over other creditors, who being unwilling to make the oath required in such cases, are pursuing the ordinary mode for the collection of their debts.

To authorize a creditor to come into chancery to ask the foreclosure of mortgages and subject the property mortgaged to the payment of his debt, he must have judgment.

It is, however, urged on the part of Everett, that he had a right, although his attachment cannot be sustained, to come into a Court of chancery as a general creditor, for the purpose of having the mortgages foreclosed and the residue of the proceeds of the sales of the property, if any, after the mortgage debts were discharged, applied to the payment of his debts. It is only necessary, however, on this point, to remark, that to enable a creditor to come into chancery for this purpose, he must have obtained a judgment, and be in a position to require the Chancellor to give him aid, in the removal of an incumbrance that forms an obstacle to the full success of his legal remedy.

And although Everett had obtained a transfer of two of the mortgages, and had on that ground a right to institute his suit, yet as they were transferred to him merely for collection, having no interest in them himself, and the debts due to him having been contracted before the trans-

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WARNER vs EVERETT.

fer, and not on the faith or credit of the property mortgaged, the doctrine of tacking, were it ever recognized in this State, in its most extensive application, would not embrace this case.

The first question must, therefore, be decided against Everett.

It has been held in relation to personal property, that notwithstanding the lien in favor of an execution in the officer's hands, the owner of the property may, by a sale of it, pass the legal title to the vendee, subject to be defeated by a subsequent levy and sale under the same execution: *Harrison* vs *Wilson*, (2 *Marshall*, 551.) The same doctrine was recognized as applicable to real property, in the case of *Addison, &c.* vs *Crow, &c.* (5 *Dana*, 271,) and a purchaser from the defendant in the execution was considered as invested with whatever title the defendant had, subject to be overreached and defeated by a regular sale and conveyance.

A debtor may sell property bound by execution, or his right therein, subject to the execution, (2 *Marsh.*, 351; 5 *Dana*, 271,) So may the owner of property attached.

In analogy to the doctrine established by these cases, we are of opinion that the owner of property which has been seized by attachment out of chancery, may, during the continuance of such seizure, sell and dispose of such title as he has to the property, and the purchaser will hold it, subject to the final decision and disposition of the suit in chancery, and the attachment attempting to create the lien.

The attachment in this case not having been sustained, it follows that the purchase was not affected by it, and if in other respects, it be good and valid, it cannot be successfully assailed.

We are not able to perceive any ground upon which it can be impeached. The debts due by mortgage, and the debts for which Joseph Warner was bound as the security of his brother, at the date of the bill of sale, and which he has since paid, except a balance due on the mortgage debts for which the property is still liable, exceed considerably, the price stipulated to be paid, and the actual value of the slaves at that time. The purchase by Everett under his execution, did not invest him with any title to the property. The defendant in the execution had, before it issued, sold the property to Joseph Warner, and con-

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sequently, were the sale not liable to the objection that the property was under attachment for the same debt, at the time it was made, still as the defendant in the execution had no title whatever, none could pass to the purchaser.

It is also insisted that the sale is fraudulent, inasmuch as the possession did not accompany the sale. Neither the reason upon which this doctrine is founded, nor the doctrine itself, applies in a case like this. The possession must remain with the vendor as well as fail to go with and follow the title, in absolute sales, to make them fraudulent. This rule of law has no application where the vendor has not the possession at the time of the sale, and where consequently, his title to the property, as well as his right to the possession of it, passes to the vendee, and nothing remains with him, to create in his favor a false credit with those persons with whom he may have dealings subsequently.

It follows, therefore, that the decree of the Circuit Court is erroneous. Everett's attachment should have been dismissed, and no costs decreed to him in his suit, on account of keeping the slaves, or other expenditures, as under the circumstances he should pay his own costs in that case, except so far as costs may have accrued to foreclose the mortgages.

The complainant, Joseph Warner, has a right to redeem the slaves, by paying the debts and interest thereon, remaining due and unpaid in the mortgages to White and Ellis, to Daniel Walker and to Walker Chambers, as reported by the commissioner.

The other mortgages have been paid off and satisfied by him. He will have a right to his costs against Everett.

The decree of the Circuit Court is reversed, and cause remanded for further proceedings, consistent with this opinion.

Hanson, Daniel and G. Davis for appellant; *Apperson and Peters* for appellee.

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TRESPASS.

Case 70.

Phillips *vs* Phillips, &c.

APPEAL FROM THE MORGAN CIRCUIT.

Assault and battery. Husband and wife.

June 16. JUDGE BIBB delivered the opinion of the Court.

If the wife commit an assault and battery in the presence of the husband, it will be taken as done by his consent and approbation, and he equally guilty.

ALTHOUGH the defendants were not sued as husband and wife, yet as they were shown to be such before the jury upon the trial, the jury were authorized so to consider them in determining how far the acts and conduct of the husband would render him a joint trespasser with the wife. To the testimony showing the existence of that relation between the defendants, there does not appear to have been any objection; nor if made, are we satisfied it would have been available. From the fact then in one instance, that the husband was present and did not interpose in any way, while the wife committed the assault and battery, and wounding, the jury had a right to infer that she acted at least with his consent and approbation, which would render him a joint trespasser with her. So in the other instance, the jury might well draw the same inference from the remark of the husband, while the wife was committing the battery, that the plaintiff was "not getting a lick amiss," although he was in an adjoining room. It was not necessary, as contended, that the husband should use actual force to render him jointly guilty with the wife. It would not have been necessary, even if that relation had not existed. A party who is present, aiding, abetting, encouraging, or countenancing the act, is equally guilty as the one who actually commits it. So, although a party may not be actually present, but he is near enough to afford aid and assistance, and he abets and countenances the trespass, he is jointly guilty as principal, with the one who commits it. The Court below, therefore, in any view of the case, was right in refusing the instructions moved by the defendants, that personal force on the part of the husband, must have been used or was necessary to render him guilty. Whether the remark

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made by the Court in overruling that instruction, "that whatever the wife did in the presence of her husband, was considered as done under his coercion, unless he attempted to prevent it," was made to the counsel or to the jury, does not appear. But whether made to the one or the other, is not deemed important; nor is it important to decide whether the rule of law be to the fullest extent as stated by the Court, as we have seen that the presence of the husband, without interposing when the trespass was committed by the wife, authorizes the inference that it was, at least, done by his consent and approbation, and renders him equally guilty as if she were considered as acting by his coercion. The remark, therefore, if made to the jury, and although not to the fullest extent true, was not calculated to mislead them.

The motion in arrest of judgment was properly overruled. The proof of the fact upon the trial, that the defendants were husband and wife, which did not appear in the declaration, constituted no ground for arresting the judgment.

Husband and wife sued in trespass, assault and battery, though not so named in the declaration if the evidence proves such relation it is no cause for arrest of judgment.

As the record only purports to contain a portion of the evidence, we are not prepared to say that a new trial should have been granted upon the alledged ground that the damages found by the jury were excessive.

Wherefore, the judgment is affirmed.

French for appellant; *Apperson* for appellees.

McAllister *vs* McAllister.

PET. & SUM. *Case* 71.

ERROR TO THE MARION CIRCUIT.

Evidence. Comparison of hand writing.

June 16.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

ON the trial of an issue on the plea of *non est factum*, the suit having been brought by petition and summons on a promissory note, the plaintiff having introduced the subscribing witness, whose evidence not being entirely satisfactory as to the execution of the note, which, however, was read to the jury, then offered two other notes

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McALLISTER vs McALLISTER.

for the payment of money, called a witness who proved their execution, and they were permitted by the Court to go before the jury, to prove by comparison of hand writing, that the note sued on had been signed by the defendant, notwithstanding an objection to the admissibility of the notes for that purpose, as well as to the proof that was made of their execution.

The general rule is, that comparison of hand writing is not competent evidence. (1 *Dana*, 179.)

The general rule excluding as evidence the comparison of hand writing by the jury, was recognized and sanctioned in the case of *Woodard, &c.* vs *Spiller*, (1 *Dana*, 179.)

With respect to the admission of such evidence, for the mere purpose of enabling the jury to judge of the hand writing, great diversity of opinion appears to prevail in the decisions in other States. In New York, Virginia and North Carolina, such testimony is rejected. It is admitted in the States of Massachusetts, Maine and Connecticut, and in Pennsylvania the admission has been limited to papers conceded to be genuine.

The Court approve this rule as the most safe and least liable to objection, concurring with the Courts of New York, Virginia and N. Carolina; in opposition to Mass., Maine, and Connecticut.

We think the rule excluding such evidence the most safe, and the least liable to objection, for several reasons. If admitted, the genuineness of the papers upon which the comparison is to be based, may be contested, and others successively brought forward, to the great consumption of time, and the multiplication of collateral issues. There will be also danger of surprize to the other party, who may not know what papers are to be produced, and therefore not prepared to meet and repel the inferences attempted to be drawn from them. To which may be added, the very reasonable apprehension, that it might lead to unfairness in the selection of the writings offered as specimens for the occasion.

—The exceptions to the rule—1st. where writings are of such antiquity as not to be susceptible of proof in the ordinary way, yet not so old as to prove themselves. 2d. where other writings clearly proved are already before the jury they may com-

There are two exceptions to this general rule:

1st. Where the writings are of such antiquity that they cannot be proved in the ordinary way, and yet are not so old as to prove themselves. Here other writings may be produced which are admitted to be genuine, or proved to have been acted upon, and recognized as such by all parties, and persons skilled in hand writing, termed *experts*, may be called to compare them, and to testify concerning the genuineness of the contested instrument.

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2d. Where other writings clearly proved, are already in the case, and before the jury. Here a comparison may be made by the jury themselves. The reason for this is obvious. As the jury have a right to look at such writings for one purpose, there is no way to prevent them from using them for the purpose of comparison; and any attempt to embarrass them, with impracticable distinctions as to the use they were to make of them, would be productive of more evil than good.

pare—there may be other exceptions.

We do not decide, it not being necessary in this case to do so, that there are no other instances that would form exceptions to this general rule. We are satisfied that this case does not form one. The two notes placed before the jury for the purpose of creating a standard to test by comparison the genuineness of the writing sued on, were objected to, were not conceded to be genuine, and might have led to the production of opposing testimony, and then the introduction of other specimens, thus bringing about collaterally the trial of an infinite number of issues, in addition to the one actually before the jury.

For the admission of this illegal evidence, the judgment will have to be reversed. And as the defendant had filed a demurrer to the plaintiff's petition, which had not been disposed of, and had also filed a plea of set-off, to which there was no replication by the plaintiff, these irregularities ought to be corrected on the return of the cause to the Court below.

The judgment is reversed, and cause remanded for new proceedings not inconsistent with this opinion.

Harlans for plaintiff; *Shuck* for defendant.

Bannister *vs* Weatherford.

CASE.

ERROR TO THE MARION CIRCUIT.

Case 72.

Practice. Variance. Contracts.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 17.

THE variance between the contract as stated in the declaration, and as established by the plaintiff's proof

A variance in the proof from the day alledged in

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BANKISTER. vs WEATHERFORD.

the declaration when property was to have been delivered, in a suit for failing to deliver it, is a fatal variance, though the declaration might have been amended during the trial.

fixing the days between which the hogs were to be delivered by the defendant, might have been removed by amendment of the declaration during the trial, and without producing a postponement. But as there was no amendment nor offer to amend, and as according to the settled rules upon the subject, this variance in the terms of the contract on which the suit was founded, must be deemed material, the defendant's motion for instructions as in case of a non-suit, should have been sustained. But as upon a reversal, even upon this ground alone, the case would go back for a new trial, and this ground of variance might be removed by amendment, it is necessary to notice another error which occured at a subsequent stage of the trial.

The evidence conduced to prove, that after making the contract with the plaintiff, and long before the time for delivery, the defendant contracted to sell and deliver the same hogs to another person, but that the hogs remained in his possession on his farm until some time after the last day named for the delivery to the plaintiff, and were never delivered either to the first or second purchaser, but were in fact delivered to some other.

The Court instructed the jury, that if after selling to the plaintiff, and before the time for delivery to him, the defendant again sold them to another, then no demand by the plaintiff was necessary.

The fact that one who had contracted to deliver cumbrous property to one person on a particular day, had contracted to deliver the same property to another person, did not authorize the person who first purchased to sue for breach of his contract, or dispense with performance on his part of every act either precedent or concurrent, which devolved upon him by his agreement.

If the second executory contract had deprived the defendant of the right or power of complying with the first, it would have dispensed with the necessity of a demand of such compliance. But as it did not so operate, the mere fact of making it, did not, in our opinion, constitute in itself, either a breach of the first contract or such unequivocal evidence of a determination not to perform it, as would authorize the plaintiff to sue for its breach without doing or tendering, on his part, such precedent or concurrent acts as by its terms were incumbent on him. The instruction above noticed is inconsistent with these views.

Wherefore, the judgment is reversed and the cause is remanded for a new trial.

Harrison for plaintiff; *Shuck* for defendant.

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Clark *vs* Smith, &c.

CHANCERY.

ERROR TO THE MONTGOMERY CIRCUIT.

Case 73.

Attachment in chancery. Usury.

JUDGE BRECK delivered the opinion of the Court. June 17.

SMITH exhibited this bill in chancery against Clark, setting up several claims against him, and alledging that he was about to make a fraudulent disposition of his property for the purpose of hindering, delaying and defrauding his creditors in the collection of their debts, and obtained an attachment and restraining order. Among the demands set forth in the bill was a note for $186 18, which the complainant claimed as assignee of James Ramsay. The allegations of complainant's bill.

Clark, in his answer, alledged and set forth various monied transactions between him and Ramsay, in which the latter had exacted from him usurious interest to a large amount, and charged that the entire consideration of this note was usurious interest, and that Ramsay was, besides, indebted to him a large sum for usury which he had paid him. He denied that he had made, or had attempted or intended to make, any disposition of his property for the purpose of defrauding his creditors, as charged by the complainant. He made his answer a cross bill against Smith and Ramsay, prayed that the note for $186 18, might be cancelled and surrendered up to him, and for such further decree against Ramsay for usury paid him, as he might, in equity, be entitled to. Clark's answer.

Smith answered the cross bill, denying that he had any knowledge of the alledged usurious exactions by Ramsay, except that the note in contest included usurious interest to the amount of $11 44, for which he had entered a credit before the commencement of his suit. Smith's answer.

Ramsay admits in his answer, with some exceptions, the allegations of Clark in his cross bill, in regard to the transactions between them, and the extent of the usury. He denies, however, that he loaned him in 1835, $600, Ramsay's answer.

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CLARK vs SMITH, &c.

as charged, but says he purchased a note upon him for about that amount, upon which he charged him 10 or 12 per cent. That in January, or February or March, 1840, he and Clark had a full settlement, and Clark paid him up all he owed him, and on the same day he loaned him, at a reduced rate of interest, viz: at nine per cent., about $500. That about a year afterwards, Clark paid him $400, and gave him his note for $157 for the residue, which note and interest was the consideration for the $186 note. He denies that the settlement and payment by Clark, of what he owed him in 1840, was in consequence of any arrangement or understanding between them that he was to release to Clark any portion of the money paid, but he assigned as a reason for paying it, that he could procure money at a lower rate of interest. That sometime afterwards, on same day, upon his agreeing to reduce the rate of interest, Clark took $500.

Decree of the Circuit Court.

The Court adopted as a basis for ascertaining the usury in the $186 note, the loan of $500, made in 1840, and upon that basis reduced it to $136 52, and for that and other sums found due the complainant, decreed a sale of the attached property. Upon the cross bill Clark was decreed his costs, but no relief over against Ramsay. To reverse that decree, Clark has brought the case to this Court for revision, and Smith has assigned cross errors.

The first question for consideration is, whether the proper parties were before the Court upon the original bill.

The assignor of a note is not a necessary party to a bill and attachment by the assignee, to recover the amount of a note.

It is contended that Ramsay was a necessary party, but the objection is deemed wholly untenable. By the assignment to Smith he had parted with all his interest in the note, legal and equitable, and was neither a necessary nor a proper party. It was not the business of the complainant, but Clark, to bring him before the Court to enable him to assert his equity against the note.

A debtor contemplating a sale of all his estate to his son, on long credits, and transferring his notes to his creditor, justifies a

2d. It is insisted that the complainant failed to show sufficient cause for suing out the attachment. It satisfactorily appears, we think, in view of the answer and the testimony in the cause, that shortly prior to the filing of the complainant's bill, Clark contemplated a sale of all his estate to his son, upon long credits, and transferring

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creditor in attaching the property under the statute.

to his creditors his son's notes. His son was entirely without means, and the object of the sale or transfer to him, although not designed ultimately to defeat his creditors in the collection of their debts, was to postpone and delay their collection, which would bring the case clearly within the provisions of the statute. We are of opinion, therefore, the Court below was right in sustaining the attachment.

3d. It is contended that the Ramsay note should have been cancelled, and that Clark, upon his cross bill, should have been decreed the residue of his claim upon Ramsay for usury.

The Court below was right, we think, in not going behind the transaction of 1840, the $500 loan, for the purpose of ascertaining the extent to which the note in question should be reduced. The deposition of Ramsay was taken in the cause, and read without objection. He adopts his answer as part of his deposition. We think it may, therefore, be assumed that the loan of the $500 in 1840, had no connection with the previous usurious transactions between the parties, and should be treated as a new and original loan. Had the amount then owing by Clark been paid up with the understanding it was to be re-loaned, or for the purpose of evading or checking the operation of the usury laws, the case would have been different, and the whole would have been regarded as a continuous transaction; but the denials in the answer, sustained by the testimony, forbid the idea that such was the case. Against the $186 note in the hands of the complainant as assignee, therefore, Clark has manifested no equity, except to have it purged of the usury included in it, regarding the loan in 1840 as a new and original loan. As against the assignee he had no right to off-set the usury previously paid assignor; and as we are satisfied too large a sum has not been decreed as due upon that note, we are of opinion there is no error in the decree, so far as it relates to the relief granted upon the original bill, to the prejudice of Clark.

But it is manifest there is an error in the decree to the prejudice of the complainant. The amount due upon the $186 note on the 22 March, 1844, after deducting the

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CLARK vs SMITH, &c.

usury, ascertained upon the principles of the decree, was $153 95, instead of $136 52, the amount decreed. For this error alone, the decree upon the cross errors of the complainant, must be reversed.

Ramsay assigned a note on Clark to Smith, who sued in chancery to recover the amount, Clark made his answer a cross bill, charging usury in the note, and showed the payment of usury before the transaction with which the note was connected. Held that he might recover it so far as not barred by time.

Upon the cross bill of Clark, we are of opinion he should have been decreed relief against Ramsey for the usury paid prior to the settlement and loan of the $500 in 1840. He charges that the monied transactions between them commenced in 1835, and had been continued up to the execution of the note assigned to the complainant. But it appears from the answer and deposition of Ramsay, that *that* note grew out of the loan of 1840, between which and the closing of the former transaction, there had been a very short interval of a few hours. The disclosure of that fact constitutes, we think, no valid objection to the relief sought, as against Ramsay, for the usury prior to the settlement in 1840.

Whether more than five years had elapsed from that settlement and payment, before the exhibition of the cross bill, does not very satisfactorily appear, nor is it important to determine, since the statute of limitations or lapse of time has not been relied on by Ramsay in bar of any portion of the relief sought.

The decree is, therefore, reversed, as to the original bill, upon the cross errors of Smith, and as to the cross bill, it is reversed upon the errors of Clark, and the cause remanded that the error as indicated to the prejudice of Smith, may be corrected; and that the usury paid by Clark to Ramsay prior to the loan of the $500 in 1840, may be ascertained and decreed to him.

Clark will be entitled to his costs in this Court against Ramsay, and Smith to his costs against Clark, but he will not be entitled to damages, as he was unwilling to abide by the decree, and at his instance it has been reversed.

Hazlerigg for plaintiff; *Hanson and Chiles* for defendants.

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Burnett *vs* Meadows' Administrator.

DETINUE.

ERROR TO THE WASHINGTON CIRCUIT.

Case 74.

Administrator. County Court. Jurisdiction.

JUDGE SIMPSON delivered this opinion of the Court.

June 19.

Case stated.

THIS is an action of detinue for a slave, brought by the defendant in error, as administrator *de bonis non* of Richard Meadows, deceased.

Meadows being a resident of Essex county, Virginia, contemplating a removal to the county of Nelson, in this State, died on the route, before he had got out of the county of Essex, after he had, his family and property being along with him, commenced his intended removal. After his death, his family continued their journey, bringing with them the property, and settled and resided for some years in Nelson county. No part of his property was actually in this State at the period of his death.

A citizen of Virginia determined to remove to Kentucky started with his property, and died on the way, his family continued the journey, with the property to Kentucky. Held that the County Ct. of the county where the family located with the property had jurisdiction to grant administration.

Has a County Court in this State, any power under these circumstances, to grant an administration on this estate?

The succession to his slaves and personal estate should no doubt be regulated by the laws of the country where he resided when he died. And had he been domiciled in the State of Virginia at the time of his death, and his property afterwards been brought into this State, no administration on it could have been granted here, as was decided by this Court in the case of *Emory* vs *Miller*, (1 *Marshall*, 300.)

Inasmuch, however, as this property was *in transitu* when he died, and afterwards reached its destination, and as many inconveniences would necessarily result from the absence of power in our County Courts to regulate its administration, it should be regarded as being at the time of his death, constructively in this State, under the circumstances here presented, solely however, for the purpose of enabling a County Court in this State to grant an administration thereon.

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BURNETT vs MEADOWS' AD'R.

Under our statutes, the jurisdiction of the County Court in granting administration, is determined by the residence of the intestate, if he have one, if he have none, then by the place of his death, or the county wherein his estate or the greatest part thereof may be.

The right to appoint an adm'r. *de bonis non*, belongs to the County Court of the county which first granted administration, tho there may be some effects in another county. it gives no right to make such appointment.

In this case, the question occurs as to the county where this jurisdiction attaches. As the property was taken, according to its contemplated destination, to the county of Nelson, and kept there for some years, that county is obviously the place where the property should be regarded as having been at the death of the intestate, and the County Court of that county must be considered as having jurisdiction over the subject, in conformity with the adjudged construction of our statute in the foregoing case of *Embry* vs *Miller*, making the language relate to the county where the estate may be at the death of the intestate, and not at the time of the grant of the administration.

The County Court of Nelson did, in the first place, grant admtnistration on this estate. That administrator having removed to the State of Missouri, the defendant in error was appointed administrator *de bonis non*, by the County Court of Washington. This appointment is attempted to be sustained on the ground, that the slave which is the subject of controversy was in the county of Washington when the appointment was made. This jurisdiction of the County Court is local. It confines itself to the county where the property is at the death of the intestate. It cannot be transfered to another county, by the removal of the property. Such a doctrine would lead to the worst results. It might impart jurisdiction to several County Courts, and give rise to the strange anomaly of two or more lawful administrators of the same estate existing at the same time.

It results, therefore, that the County Court of Washington had no power to make the appointment, and consequently that the person so appointed had no right to demand or sue for the property, as was decided by this Court in the case of *Drake's administrator* vs *Vaughn*, (6 *J. J. Marshall*, 143.)

An instruction to this effect was moved for on the part

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of the defendant, in the Circuit Court, and was overruled. In this the Court erred.

JARBOE vs McATEE'S HE'S.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

Thurman for plaintiff; *Booker* for defendant.

Jarboe *vs* McAtee's Heirs, &c.

CHANCERY.

APPEAL FROM THE MARION CIRCUIT.

Case 75.

Evidence. Grants. Presumptions. Lapse of time. Power of Attorney. Costs.

JUDGE SIMPSON delivered the opinion of the Court.

June 19.

THIS is a suit in chancery, brought by the plaintiff in error, against the administrators and heirs of George McAtee, deceased, for a specific execution of a contract, by which George McAtee in his lifetime, sold to him a certain tract of land, that he is anxious, as he alledges, to retain, if he can procure a good title for it from the defendants, if not, he asks a rescission of the contract upon equitable terms.

Case stated.

The administrators of McAtee having obtained a judgment at law against him for the last instalment of the purchase money, he enjoined that judgment, and alledged that he had tendered to the administrators the balance of the purchase money, and offered to pay it over to them, upon the condition, that they would make him a good title to the land.

The Court on the hearing of the cause, decreed that the defendant's title was good, caused a deed to be executed by them to the complainant, dissolved his injunction without damages, but gave him no decree for his costs.

Decree of the Circuit Court.

Several objections are made to the title, which we will dispose of in the order that they arise.

No patents having been filed by the defendants, it is contended, that this forms an insuperable objection to their title, as there is nothing to show that the Common-

Testimony admitted without objection in the Circuit Court,

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JARBOE vs McATEE'S HE'S.

thoughnot of the highest grade, cannot be objected to in this Court.

wealth has ever parted with her title to this land. This objection is unavailing, for two reasons. In the first place, the testimony in the cause shows that part of the land is covered by Williams' patent, and the residue thereof by a patent to Samuel Conley. This evidence was used without objection; and although if excepted to as illegal, it should have been excluded, it not being the best evidence to establish the existence of the patents, yet having been admitted, it is sufficient to show that the title to the land has passed from the Commonwealth.

This Court will presume a grant from the Commonwealth after a possession of 50 years, the possessors claiming and holding as owners, (3 *Stark.* 1221; *Greenleaf*, 50.) A grant has been presumed in N. York upon a possession of less than 40 yrs. (10 *John.* 377.)

In the next place, the testimony clearly shows the fact, that at the time when the case was heard, the complainant, and those under whom he claims, had been in the possession of the land, claiming it during all the time as their own, for upwards of fifty years, which would have authorized the presumption that a grant to the land had been made by the Commonwealth.

After long continued enjoyment, a grant from the crown may be presumed: (3 *Starkie*, 1221; *Greenleaf on Evidence*, 50.) In regard to public grants, a longer continued peaceable enjoyment has generally been deemed necessary, in order to justify this presumption, than is deemed sufficient to authorize the like presumption in the case of deeds from private persons.

In the State of New York, it has been decided that less than forty years possession of a tract of land, where it appeared that there had been an order of council for the survey of the land, and an actual survey thereof accordingly, created the presumption that the patent had been duly issued: (10 *Johnson*, 377.)

It is the policy of the law, and necessary to the repose and security of society, that such a presumption should be indulged, where individuals have continued in the possession of the land for a great many years, treating it as their own, and holding and claiming it, under a patent from the Commonwealth, either to themselves or to some other individual.

We are of opinion that after the lapse of fifty years, which is the longest period allowed by our statute, for the institution of a suit for any description of real property, the presumption of a grant from the Commonwealth, is

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authorized in favor of a possession which has been continued during the whole time, where the land so possessed is claimed to have been patented and held under such claim. This presumption is peculiarly proper in this State, the history of its land titles showing that the lands were often covered by several conflicting grants.

An agent who conveyed land, will be presumed to have had authority to convey, after possession held on his deed for 50 years.

For a portion of the land sold to the complainant, a deed had been executed from Samuel Conley to Henry McAtee, in the year 1793, by an individual who represented himself to be the agent of Samuel Conley, who was the patentee. No evidence of that agency having been produced, it is contended that the title as to that part of the land, is defective, nothing having passed by the deed, in consequence of the want of authority in the agent who made it. McAtee and those claiming under him, having, however, held the possession of the land ever since under that conveyance, the existence of a power of attorney may, after so great a lapse of time, be presumed, particularly as the possession has, by its long duration, ripened into an indefeasible title.

The grantee in a deed of conveyance assigned for *value received*, to his vendee all his right and title to land described in the deed. Held not to be within the statute of frauds, and the Chancellor should decree a conveyance. (3 *Littell*, 262.)

It appears that Isaac Pottinger having a deed for a part of the land, sold it to George McAtee, but that instead of making him a deed of conveyance, he merely assigned over to him all the right and title to the deed he had, for value received. The defendants, by cross bill, brought the heirs of Pottinger, he having died, before the Court, and they were decreed to convey to the complainant; and it is now urged that the Court had no power to direct such conveyance to be made, the assignment on the deed not being such a memorandum of a contract in writing, as would take the case out of the statute of frauds. The deed itself is sufficiently descriptive of the land sold, the assignment is for value received, and shows the payment of the consideration. It was within the principle settled in the case of *Fugate* vs *Hansford*, (3 *Litt.* 262,) and authorized the Court to enter up the decree that was rendered.

As it regards the forty nine acres of land, McAtee was only to make the complainant such title as the bond he held on Isaac Pottinger and others stipulated for, that title he got, and he has no right to object to it. The proof

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JARBOE vs McATEE'S HE'S.

shows, however, that it had been held in possession by Pottinger and those under whom he claimed, for upwards of forty years.

In estimating the duration of a possession in a contest between vendor and vendee about title, the calculation should embrace the time up to the trial, and if the vendor's title is then good vendee must accept it.

In estimating the duration of the possession, it ought to be brought up to the time of trial, and not be made to stop at the commencement of the suit. If the vendor is able, at the time when the cause is tried, to make a good title, the settled doctrine upon the subject is, that the vendee who comes into chancery for a rescission, will be required by the Chancellor to accept the title then made perfect, the consequence of which is, that the possession of the vendee up to that period, enures to the benefit of, and goes to strengthen his, vendor's title.

This Court will not, in the absence of proof, presume that a *feme covert* who conveyed thirty years ago is still living.

We consider the certificate of the Clerk on the deed of Henry McAtee and wife to Isaac Pottinger, sufficient for the purpose of passing the wife's dower. The deed is dated in eighteen hundred and eighteen, and as it is not shown that McAtee's wife is still living, the Court would not feel inclined to indulge the presumption that she still continued to live, when nearly thirty years have elapsed, even had the acknowledgment of the deed as certified by the Clerk, been deemed insufficient to transfer her right of dower to the vendee.

There is nothing in the objection that Williams has never been paid for the land within his patent boundary. The presumption of payment, after the lapse of some forty five or fifty years, is irresistable, and cannot be repelled by any declarations made by Pottinger, after he had sold; such declarations not being evidence against his vendee.

At law, a tender of money will be of no avail to stop interest, unless the money be brought into Court when the tender is pleaded; so in chancery when a tender is relied on.

It is urged, however, that Jarboe should have been relieved from the payment of interest on the balance of the purchase money, and that the decree in this respect is erroneous. The proof of tender is not complete. The witness did not know the amount of money actually tendered. But were the evidence on this point sufficient, in order to make a tender available in a case of this kind, it is incumbent on the complainant to pay the money into Court, so that during the long progress of a chancery suit, it may, under the control and direction of the Chancel-

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lor, be rendered productive. In a plea of tender at law, the party to get the benefit of his plea, has to bring the money into Court. Much stronger reasons exist for requiring this to be done in a case to be settled by the Chancellor. In his Court, equitable considerations have an extensive influence. Seeing the purchaser in the possession and enjoyment of the land, and still retaining, and in all reasonable probability, using the money, after a formal tender of it to his vendor, it would appear just and equitable that he should be held responsible for the interest on it, from the time it was payable.

A vendee going into chancery to compel a conveyance of a good title, has a right to his costs where the title is perfected after the filing of the bill.

The complainant, however, was entitled to his costs. When he instituted his suit the defendants were not able to make him a title. He had a right, therefore, to apply to the Chancellor for relief, and his costs ought to have been decreed to him.

For this failure the decree is reversed; in every other particular it is affirmed, and the cause is remanded with directions to render a decree that the defendants, the administrator and administratrix of George McAtee, out of the assetts in their hands unadministered, pay to the complainant his costs in that Court expended.

As the plaintiff in error assailed the decree upon its whole merits, and only obtained a very partial reversal, he will not be allowed his costs in this Court. The parties must pay their own costs here.

Morehead & Reed and Hill for appellants; *Hardin, Harlan & Craddock and Kelly* for appellees.

Hunter, &c. *vs* Brown.

CHANCERY.

ERROR TO THE NELSON CIRCUIT.

Case 76.

Partition. Conveyances. Practice.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 22.

To decree conveyances is a prominent ground of equity jurisdiction in cases of partition, hence

THE power of a Court of equity to decree mutual conveyances, is a distinct and prominent ground of equity jurisdiction in case of partition. At law the proceeding stops with the ascertainment of the different shares, and

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HUNTER, &c. vs BROWN.

placing the parties in posssession. In equity "it proceeds upon conveyances to be executed by the parties," and cannot be effectually had without them: (*Story's Equity, sec.* 652; 2 *Sch. & Lef.* 371–2.) And as the Court does not decree conveyances from parties having equitable titles merely, it follows that where those immediately interested in the partition have equitable and not legal title, the holders of the legal title should be before the Court, so that by the conveyance from him, the object of the proceeding may be completely attained, and the litigation on the subject fully ended.

the holders of the legal title must be parties.

In a case where, owing to peculiar circumstances, the legal title could not be at once conveyed, the Court might doubtless, make partition, give possession and secure the enjoyment accordingly, until effectual conveyances could be made: (*Story's Equity, sec.* 652.) But where there is no obstacle to decreeing the title at once, or where the obstacle is such that its removal may affect the partition itself, the general practice of the Court, and the principle and object of its jurisdiction, require such proceedings, that the whole matter should be settled and the partition effectuated by a conveyance of the title according to the equities of the parties. Otherwise, one or more new contests may spring up in the attempt to procure the legal title. In this case the holders of the legal title seem to have been made defendants and to have been served with process upon Brown's bill for partition, and might, upon proper preparation, have been decreed to convey, if they are bound to do so. But there is no decree for conveyance against them, and no guardian *ad litem* having been appointed for such of them as are infants, and no allegation being made that they had received the purchase money, the case does not appear to have been in a condition for such a decree. And yet there seems to have been a final decree confirming the reported partition and decreeing mutual releases between the parties to it, without ascertaining and concluding the rights of the title holders, who may still assert a claim by which the mutual equities of the parties and the justice of the partition may be affected.

When upon decreeing partition the legal title cannot be at once made, the Chancellor may secure each in the enjoyment of his part until the conveyances can be made. (*Story's Eq, sec.* 652.)

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In making partition of land, regard should be had not only to quality of soil, and quantity of land, but also value as affected by locality, convenience to public roads and other permanent advantages.

This partial disposition of the subject being irregular and premature, may be justly complained of, and constitutes a ground of reversal, the effect of which will be to bring the partition itself again within the power of the Court, as an interlocutory proceeding. And as upon consideration of the interlocutory decree under which it was made, and the exceptions and evidence taken, we are inclined to the opinion that the commissioners may have confined their views to equality in quantity and quality of soil, without estimating the relative value of the several lots or portions, as affected by locality, convenience to public roads and other permanent advantages, and that under this limited view, injustice has probably been done, we think the partition as reported should be set aside, and commissioners directed to make partition with a view to equality of value as well as of quantity and quality, so that the relative vendible or market value of the lot assigned to each party, shall be proportioned as near as may be, to the extent of his interest.

Wherefore, the decree is reversed and the cause remanded for further proceedings and decree in conformity with this opinion.

Grigsby for plaintiffs; *B. Hardin* for defendant.

Swearingen, &c. *vs* Leach.

COVENANT.

ERROR TO THE BULLITT CIRCUIT.

Case 77.

Evidence. Practice in suits at law.

June 23.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

THE evidence conduces to prove, and the jury might have found, that a portion of the money collected upon Leach's execution was claimed by H. Crist, and admitted by Leach to belong equitably to Crist, but they could not then agree on the sum to which each was entitled; that under these circumstances, and under an agreement relating to their mutual claims upon it, the money was deposited in Leach's name with the defendants, S. and S., and their covenant taken to pay the money to him or

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SWEARINGEN, &c vs LEACH.

his order; that about two years afterwards, in 1840, Leach received $600 of the money, which he acknowledged to Crist was all he was entitled to, saying he was fully satisfied, and that "the balance of the money in the covenant was coming to Crist;" that by subsequent agreement between Crist and the defendants, this balance was settled in a manner satisfactory to them; and it does not appear that Leach made any claim or demand of the balance until this suit was brought in 1846.

If Crist was authorized to receive the balance due on the covenant in 1840 as his own, his agreement with the covenantors as to the mode of settlement, and the actual settlement to his satisfaction was a discharge of the covenant, and in substance a performance, and the conversations between him and the defendants, constituting or proving this agreement and settlement as between them, would be admissible against the covenantee himself in a subsequent action by him for the balance which had been thus settled. If Crist was in fact authorized to receive the balance for his own use, he had a right to release it, or to receive or acknowledge satisfaction on such terms as suited him. He in fact represented the covenantee in regard to it, and such of his acts and declarations in relation to it as would be evidence against himself, would be evidence against Leach. The fact that the covenant was not delivered or assigned to him, and that there was no written evidence of such authority, renders the proof of its existence more difficult. But such authority might unquestionably exist without writing or delivery of the covenant, and if it did exist, the consequences which have been stated, necessarily followed.

The admissibility and relevancy of the evidence of Crist's acts and declarations being thus dependent upon his authority to receive and dispose of the balance remaining unpaid to Leach on the covenant, the Circuit Court, after all the evidence had gone to the jury without objection, excluded (on motion of the plaintiff) so much of it as detailed "what Crist and the defendants said," embracing, as we understand, all proof of the settlement between them, and then instructed the jury to find for the plaintiff.

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If this exclusion of evidence did not take from the jury all which would have authorized them to find that the balance due on the covenant had been settled with Crist to his satisfaction, then the propriety of the instruction to find for the plaintiff depends upon the question whether there was evidence conducing to prove, and on which the jury might have found that Crist was authorized to receive and settle it according to his own convenience and judgment.

Where proof of one fact in the trial of a cause before a jury, is necessary to let in proof of another fact, and there is evidence conducing to prove the preliminary fact, the Court should not generally exclude from the jury such evidence, but leave its weight to the jury.

If, as we suppose, all the evidence of such settlement was excluded, then as without such settlement the most certain and express authority to Crist not amounting to the transfer of the legal interest in the covenant, would not have affected the covenantee's right of recovery, the instruction was right upon the evidence left before the jury, and the question would be, whether the exclusion of the settlement with Crist was proper. This question, as we have seen, depends upon the question of fact as to the existence of his authority. How far then, had the Court a right to decide the question upon the motion to exclude a part of the evidence? Where the materiality of one fact, and the relevancy of the evidence offered in proof of it, depend upon the existence of another material fact which has been attempted to be proved by evidence before the jury, is it the province of the Judge to decide upon the weight of the evidence as to the existence or non-existence of the principal fact, or is he to decide merely the legal question whether the evidence conduces to prove it, leaving its actual efficacy to the consideration of the jury?

If the fact on which the relevancy of the disputed evidence depends be merely preliminary, and no otherwise essential than as it may lay the foundation for receiving the evidence in question, then it may perhaps in all cases be proper to make the admissibility of the disputed evidence depend upon the judge's opinion as to the sufficiency of the proof to establish the preliminary fact. But where the preliminary fact is otherwise material in the cause, and essentially involved in the issue, the general practice is, to admit the dependent evidence, if in the opinion of the Judge there be evidence conducing to

If the fact on which the relevancy of the disputed fact depends, be merely preliminary, and no otherwise essential than as it may lay the foundation for receiving the evidence in question, then it may be perhaps in all cases proper to make the admissibility of the disputed evi-

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SWEARINGEN, &c. vs LEACH.

dence depend upon the Judge's opinion of the sufficiency of the proof to establish the preliminary fact.—But if the preliminary fact be otherwise material in the case, and essentially involved in the issue, it is generally otherwise.

prove the preliminary fact, and from which a jury might rationally infer it. A contrary practice would in many instances, as in this, take the whole case from the jury, and subject it to the decision of the Judge upon the weight of the evidence, thus destroying the established distinction between their respective functions. When it is necessary to prove a deed, the instrument is admitted to be read to the jury, upon evidence conducing to prove its execution, could a judge afterwards exclude it on motion, on the ground that the proof of its execution was not fully satisfactory to his mind, or could he have rejected it on this ground, even in the first instance? The execution of the deed being the material fact in the issue, the Judge does not decide it peremptorily, though it is in one aspect a preliminary fact, but having decided that there is evidence conducing to prove it, he places the whole question of fact before the jury.

We are satisfied that in this and similar cases, where the relevancy of one fact depends upon another material fact in the cause, the admissibility of evidence in support of the dependent or secondary fact, depends not upon the absolute proof of the principal fact, but upon their being such evidence as conduces to prove it, and would authorize the jury to find it. The exclusion of the evidence of Crist's settlement in this case, could only be sustained upon the ground that the other evidence did not conduce to prove that he was authorized by Leach to receive and settle, for his own use, the balance due on the covenant. Without entering upon a discussion of the evidence on that point, which has been already stated, we are of opinion that it authorized the inference that by agreement between Leach and Crist, the latter had the right to receive, and was authorized to receive, for his own use, the balance remaining due, and that upon the whole evidence, the jury might have found for the defendants. The Court erred, therefore, in excluding the evidence in question, and in giving the instruction to find for the plaintiff.

Wherefore, the judgment is reversed and the cause remanded for a new trial.

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Riley and Morehead & Reed for plaintiffs; *Crittenden, Hardin, and Harlan & Craddock* for defendant.

Poston, &c. *vs* Southern.

MOTION.

ERROR TO THE HARDIN CIRCUIT.

Case 78.

Forthcoming bonds. Chancery. Jurisdiction.

JUDGE BRECK delivered the opinion of the Court.

June 23.

An officer has no right to take a forthcoming bond upon the levy of an execution endorsed "no security of any kind to be taken." It may be a good security to himself, but not as a statutory bond.

The Chancellor had no jurisdiction to interfere to stay proceedings upon an execution issued upon a delivery bond, taken by a Sheriff upon an execution, and endorsed "no security of any kind to be taken," a Court of law was competent to render full redress.

IT was settled by this Court in *Richardson and Letcher* vs *Bartley*, (2 *B. Monroe*, 328,) that when the execution is endorsed "no security of any kind to be taken," the officer has no right to take a *statutory* forthcoming bond, and if taken, that it could not be returned and made the basis of an execution. It might be good as an indemnity to the officer, as a common law bond, but not otherwise.

The delivery bond in this case was, therefore, not authorized as a statutory bond, and was improperly and illegally returned by the Sheriff as such, and the execution which issued upon it was consequently unauthorized and illegal. But we are of opinion it was not the province of the Chancellor to interfere and restrain the officer, who, in this case, had taken and returned the bond and who was endeavoring to collect the execution which had illegally issued upon it. It is the peculiar province, and every Court has ample power to correct its own process. In this case the complainant, who was surety, first in the replevin bond and then in the delivery bond, and upon whose property execution upon the latter bond had been levied, had ample remedy at law. The Court, upon motion, would have quashed the execution, or, if relief in that mode could not be obtained in time to prevent a sale of his property under the execution, which is urged as a reason for seeking the aid of the Chancellor, he could have arrested the action of the officer by *writ of error coram vobis*. The Chancellor had no jurisdiction upon the ground that the delivery bond and the execution thereon, were illegal, and upon no other ground has the complain-

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FLOYD vs FLOYD, &c.

ant manifested any right to relief. It seems to us, therefore, that the injunction was improvidently awarded and that the decree annulling the delivery bond and execution thereon, is palpably erroneous and abortive. The Chancellor has no power to annul the process or judgment of a Court of law.

Wherefore, the decree is reversed and the cause remanded, with directions to discharge the complainant's injunction and dismiss his bill with costs.

Harlan & Craddock for plaintiffs; *Hardin* for defendant.

CHANCERY.

Case 79.

Floyd *vs* Floyd, &c.

APPEAL FROM THE GARRARD CIRCUIT.

Slaves. Distribution. Devises. Administration.

June 10.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The Court making distribution of estate undisposed of, and as to which the testator dies intestate, should not without reason, assume, without allegation or proof, that the testator, had not done justice, and direct an account of advancements made in order to make the children equal out of property undisposed of by will.

IT seems to this Court, that there is no sufficient evidence of a gift or transfer of the slaves Polly and her five children, from John Floyd to Davis Floyd, and that they are to be considered as a part of John Floyd's estate in the hands of Davis Floyd, as his administrator with the will annexed. And as these slaves were not devised, John Floyd died intestate as to them, and they are subject to distribution according to the laws of the State.

On examining the statutes of distribution, we are of opinion that the case of partial intestacy is within the principle of the act of 1830, (2 *Stat. Laws*, 784,) as it is within the letter of that of 1797, (*Sec.* 28, 1 *Stat. Laws*, 661,) and that the estate not devised is subject to distribution in such manner as to equalize the advancements made by the decedent in his lifetime, in whatever species of property they may have been made. But as it may be presumed that a father intends equality among his children, and that in making his will he takes into consideration the previous advancements to each, the Court should not, *ex mero motu*, assume the contrary, nor direct an account of advancements in a case of par-

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tial intestacy, except so far as a basis is laid for it in the pleadings of the parties by suggesting inequality, and asking and offering equity.

In this case no inequality is suggested and no statement of advancements made in the pleadings, except as regards the slaves given by the testator to his children, or their representatives, during his life. And, therefore, these advancements alone, should now be regarded in the distribution of the undivised estate, which should be so distributed as to make up, as far as may be, any inequality in the advancements of slaves. Whatever is devised by the will is neither subject to this distribution, nor to be taken into the account as advancements, but is to be appropriated according to the direction of the will. But the slaves named in the will and directed therein to be equally divided and which were actually distributed by the testator, are to be considered as advancements. Since the gift or distribution of them by the testator in his lifetime, must be regarded, *pro tanto*, as a revocation of the will. In this view, the will operates only on the remaining slaves therein named, which must, according to its direction, be equally divided among the devisees and their representatives, without regard to the advancements. The others being in fact, undevised and given in the lifetime of the testator, must be regarded as advanced.

A gift or other disposition of slaves previously devised, is *pro tanto* a revocation of the will.

Upon the evidence in the record, it seems probable that there has not been an entire equality in the advancements of the slaves. And as those which are named in the will and were not distributed or given by the testator in his life, must be equally divided, and those which descended may be subject to a different distribution, they properly form two classes, and should not have been directed as one lot to be equally divided. Another satisfactory ground for this discrimination is, that as to the slaves which descended, the administrator is entitled to a refunding bond, but the slaves on which the will operates, belong to the devisees and should be appropriated to them without any such burthen.

Slaves devised, pass at once to the devisee, and the executor has no right to ask a refunding bond before distribution as to slaves descended he may demand such bonds.

The decree is, therefore, erroneous, in directing a division of the two classes of slaves without discrimination,

Slaves devised and slaves descended should

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FLOYD vs FLOYD, &c.

not be counted in one class for division, but kept separated; and so divided as two classes.

and also in directing a division of the slaves which descended, without an account of the advancements in that species of property, to be ascertained by a commissioner, and a bond should be required before their distribution. The division of the slaves which pass by the will, might have been directed at once if desired, and without waiting for an account of advancements or hires.

Andministrators should be allowed in their accounts for taxes paid on slaves, and commission on hire, as well as the legal expenses of administration.

With regard to that part of the decree which estimates the hire of the slaves, we do not perceive that the administrator has any ground to complain except as to the hire of Polly and her children, which we think too high, considering the ages of the children. But as this part of the case should also be referred to the commissioner, we leave it with the single additional remark, that the administrator having considered and treated Polly and her children as his own, and not entirely without ground, he should not be charged with what they might have been hired for in the market, but with the reasonable value of their services to him. The charges made against the administrator on account of the personalty, seem to be correct, and to embrace every thing properly chargable, unless a small item of interest to be noticed hereafter, should have been charged; but he is allowed no commission on the hire of the slaves, nothing for his care of them, or for taxes which must be assumed to have been paid by him, and nothing for the legal fees and expenses of the administration, which must necessarily have been incurred. For the ascertainment of these and any other just credits, this part of the case should also have been referred to the commissioner. And the decree is erroneous in making no allowance for them, and in not requiring a refunding bond for the estate distributed.

We perceive no error in the refusal to continue the cause on the ground alledged. Nor do we perceive any error to the prejudice of the appellees, unless in failing to charge the administrator with interest on about $90 in money remaining on hand at the death of John Floyd, which, however, may have been properly expended or kept on hand, a matter which may be ascertained by the commissioner.

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But for the errors before noticed, the decree is reversed and the cause remanded for further proceedings, and decree consistent with this opinion.

Turner and Dunlap for appellant; *Letcher & Tilford* for appellees.

Jarman, &c. *vs* Wilkerson.

CHANCERY.

ERROR TO THE MORGAN CIRCUIT.

Case 80.

Femes covert. Appointment.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 11.

How far the engagements of a *feme covert* for the payment of money not expressly charging or referring to her separate estate, should be regarded in equity as an appointment or charge upon such estate, has not, as we believe, been expressly decided in this Court.

A *feme covert* entitled to a separate estate executed a note as the surety of her son. Held that it was *pro tanto* a charge upon her separate estate in the hands of her trustee, which might be subjected by the Chancellor.

The modern doctrine of the British Chancery seems to be, that as an incident to the power of separate enjoyment as recognised in equity, the *feme* has the power of charging her separate estate, (3 *Maddock's Chy. Rep.* 934; *Ibid*, 201,) but that without a charge on her part, either express or implied, it cannot be reached. In *Hulme* vs *Tenant*, (1 *Bro. C. C.* 20,) it was held that when a wife joins with her husband in a security, it is an implied execution of her power to charge her separate estate. And in *Stewart and wife*, vs *Kerkerwell, &c.*, (3 *Maddock's Chy. Rep.* 387–8,) the Vice Chancellor said, "this Court will consider a security executed by her as an appointment *pro tanto*," &c., and the separate estate, was subjected to the payment of a bill of exchange drawn by the *feme covert*.

Assuming this to be the true equitable doctrine, it follows that the execution of a promissory note by Mrs. Jarman, as the surety of her son, was impliedly so far an execution of her power over her separate estate in the slaves held by her trustee for her sole and separate use, and should be considered as an appointment *pro tanto*. For it cannot be admitted that her declaration, "that she

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JARMAN, &c. vs WILKERSON.

would not pay the note, and that her estate should not go to pay it," made to her son at the time of signing it, can have the effect of counteracting the plain tenor of the note, or the equitable implication arising from it. We doubt whether a declaration so inconsistent with the act itself, should have such an effect, even if made in the presence of the payee, but being made in his absence, and not communicated to him, it is clearly of no avail. The son, though he received the note from his creditor for the purpose of getting his mother's signature, addressed her on his own account, and neither presented himself, nor was regarded by her as the agent of the creditor. Nor was that his real character. It would be grossly inequitable towards the creditor, to deprive him of his security, on the ground of this secret conversation between the mother and her son.

Where a *feme covert*, owner of a separate estate, signed a note as surety for her son, was sued and permitted judgment to be entered against her, without relying upon her coverture, execution issued thereon upon which there was a return of "no property found." Held that her separate estate might be subjected to its payment by the Chancellor.

But if the doctrine of the cases above referred to be not received as authoritative to the full extent, still we are inclined to the opinion, that as a judgment has been rendered on the note against both the parties, and an execution thereon has been returned "no property found," the case comes under our statutes authorizing the subjection of equitable interests to the satisfaction of judgments upon such a return being made on the execution. The coverture of Mrs. Jarman not having been relied on at law, either to prevent or reverse the judgment against her, it cannot be regarded in this proceeding as being void. And no reason being shown for not having relied upon the coverture at law, and no equity being in fact made out against the judgment, we think the Court of Equity has the same power of enforcing it against the equitable interest of either defendant, as if the coverture did not exist.

Wherefore, the decree is affirmed.

Caperton for plaintiffs; *Turner* for defendant.

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Williams *vs* Hall, &c.

CHANCERY.

ERROR TO THE MONTGOMERY CIRCUIT.

Case 81.

Practice in Chancery. Parties.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 16.

On filing a petition by one who conceives himself interested in the event of a chancery cause, the correct practice is to ask orally of the Court that the matter of it be considered, and the petitioner be made a party—otherwise it is not the duty of the Court to take up the subject of the petition until the hearing of the cause.

IN the case of *Hall* vs *Hall's heirs*, in chancery, Williams not being a party, swore to and filed his petition, answer and cross bill. The petition referring to and embracing the answer, prays that he be made a party, and the accompanying answer be taken as an answer to the bill, &c. It does not appear that any motion to this effect was openly made in Court, further than is implied by filing the petition and answer. We are of opinion, however, that the petition itself is to be regarded as a written application to the Chancellor that the petitioner should be made a party; and that being filed in open Court, noted upon the record, and placed among the papers of the cause, it is properly a part of the record, to be read and acted on as such by him whenever the case is submitted for his action, unless by reason of intervening circumstances laches or otherwise, the benefit of the application should be considered as being lost or abandoned. The usual, and convenient practice is, to move the Court orally upon the matter of the petition and as soon as it is filed, so as to have a decision at once upon the right of the applicant to be made a party. It is not the duty of the Court to take up the application before the hearing of the cause, unless upon motion to that effect. And in view of the great inconvenience which might arise from a delay of preparation in respect to parties, the Court should perhaps disregard such an application, if after being permitted to remain a long time without being brought to its notice for decision, it is at last only found among the papers, under circumstances which might authorize the presumption that it was waived or had no real foundation.

—But if such petition be filed of record, the pe-

But we do not suppose that the benefit of an application of this sort, or the right to have it decided is lost by

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titioner should not lose the benefit thereof by failing to require the action of the Court thereon before the hearing of the cause.

the mere failure to move expressly for a decision at the moment of filing the petition. The petition itself asks for a rule upon the complainant to make the petitioner a party. It is a written motion to that effect, made in the case, and properly filed as a part of the record. And any further or oral motion is only necessary for bringing it at once before the Court. Unquestionably this might have been done at any time during the term at which the petition was filed, and more specially while the cause remained undisposed of. And as this cause was in fact submitted at the same term at which the petition was filed, and in three days afterwards, we think the petition is to be considered as having been then properly before the Court for decision, and as having been then, in fact, decided and overruled by the decree rendered upon the merits without noticing Williams.

One who filed a petition of record to be made a party to a pending cause, but which the Court disregarded, may prosecute a writ of error to the decision of the Court in disregarding it.

Is Williams then, so connected with the record that he may prosecute a writ of error to reverse the decree because he was not made a party? If before the hearing he had expressly asked the Court to dispose of the prayer of his petition, and it had been expressly overruled, and he had taken a bill of exceptions, there could be no doubt of his right to prosecute the writ of error, nor of the propriety of reversing the decree on his writ, if his petition showed that he was a necessary party. But as he had a right to file his petition, and it was filed and noted, and thus become a part of the record, the bill of exceptions would not have been necessary to make it a part of the record, but would only have been useful to show when and how, and under what circumstances, the disposition of it had been asked for and made. If the record itself in stating the filing of the petition had stated also that it was overruled, a bill of exceptions would have been unnecessary, unless to show some extraneous fact which would not otherwise appear. This case differs obviously from a mere motion for leave to file a bill or other paper in a pending cause, when the paper does not, by the mere effect of the motion, become a part of the record.

In this case every thing appears which is necessary, viz: that the application, by petition, to be made a party, was

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regularly filed in open Court, that as a part of the record it was before the Court for decision on submission of the cause without an undue delay, after it was filed, and that by the decree it was overruled. A bill of exceptions was unnecessary and would have been inappropriate. And although Williams was not pressing for a decision of his application; yet as he had not lost the right of doing so with full effect, and it was in fact before the Court and was in fact overruled, we think he is entitled to question the correctness of the decision as much as if he had pressed it.

One who by his petition filed of record, shows himself to be interested in the subject matter in contest, should be made a party, and for the failure of the Court to require it to be done, the cause may be reversed on the application of the petitioner.

Upon the facts stated in the petition, Williams was clearly a necessary party, entitled to litigate the complainant's claim, and interested in the subject of the suit. The overruling of his petition was, therefore, an error, and as the decree is prejudicial to his interest, it is subject to reversal on his writ, as the remedy for the error of his not being made a party. Whatever other errors there may be in the record, they cannot be complained of by him in his present attitude, and are, therefore, not noticed.

Whether any of the actual defendants might have reversed the decree for the want of proper parties, as shown by the petition of Williams, need not be decided. The writ of error is in his name only against all the actual parties. And it is to his rights only that this opinion is intended to refer.

Wherefore, the decree is reversed and the cause remanded, with directions to rule the complainant to make the petitioner, Williams, a defendant to his bill, under penalty of having it dismissed without prejudice, and for further proceedings.

Hazlerigg for plaintiff; *Apperson and Peters* for defendants.

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COVENANT. **Commonwealth, for Anderson *vs* Lightfoot, &c.**

Case 82. ERROR TO THE BRECKINRIDGE CIRCUIT.

Sheriffs. Levy of Executions. Damages.

June 23. JUDGE SIMPSON delivered the opinion of the Court.

Case stated. THIS is an action against a Sheriff on his official bond, and the breach mainly relied upon is, that having an execution in his hands in favor of the relator, he failed to make a sufficient levy.

It is the duty of a Sheriff to make a sufficient levy to satisfy the execution in his hands—but not an excessive levy. He should be governed in this by a sound discretion.

It is no doubt the duty of an officer in levying, to take property enough, if to be had, to satisfy the execution in his hands. It is not admitted, however, that the discharge of this duty requires him, at his peril, to seize on property to an extent sufficient, when it is disposed of by public sale, to raise, in any event, a sum sufficient for this purpose. In the performance of this duty he must exercise a prudent, reasonable and cautious discretion. If he fail to do this it is a violation of his duty. He is, in this respect, to be governed by the rules which influence the conduct of discreet and prudent men in the management of their own affairs. He must take into his possession an amount of property, sufficient when sold, in all reasonable probability, making a proper allowance for the sacrifice usually incident to officers sales, to bring a sum that will pay off the execution in his hands. But he may be liable on the other hand, to the defendant in the execution, if he make an excessive levy. He is, therefore, to perform his duty as Sheriff, having an eye to the security of the plaintiff's debt, and avoiding all acts of oppression towards the defendant.

Testing the conduct of the Sheriff in this case by this standard, we are inclined to the opinion that the levy made by him should be deemed insufficient.

If the Sheriff fail to levy, or to make a sufficient

The injury, however, which the plaintiff in the execution sustains by the official delinquency of the officer in its management, determines the extent of the officer's

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liability for such delinquency. It does not follow as a matter of law, that an officer is rendered liable for the whole debt, by a failure to levy an execution in his hands. His liability is fixed by the extent of the injury sustained by the creditor. If the collection of his debt be merely postponed, but its safety not jeopardized, although the officer, in consequence of his misconduct, is liable to an action, he is not to be subjected to the same amount of damages, as if the debt had been entirely lost. In this case the plaintiff has failed to manifest by proof, the extent of his injury. He has not produced any evidence that the defendants in the execution are insolvent, or that he has been unable to collect his debt. He has rested his claim to a recovery of the full amount of his execution, solely on the ground of the failure of the officer to make a sufficient levy, without attempting to show the damage he has sustained by such failure. In this description of action the amount of the execution is not the measure of damages; but the actual damage sustained, to be manifested by the particular circumstances of each case: (3 *Bibb*, 356; *Littell's Select. Cases*, 132.)

levy, the damages should be assessed proportionate to the injury, not the amount of the execution, unless such has been the extent of the injury to plaintiff.

Admitting, therefore, the levy to have been insufficient, and the subsequent conduct of the Sheriff in disposing of the property to have been improper and illegal, we are not able to say that the Court erred in overruling the plaintiff's motion for a new trial; it not appearing that the verdict which he obtained, was inadequate to meet the full extent of the injury which he sustained.

Wherefore, the judgment is affirmed.

Harlan & Craddock for plaintiff.

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Moore, &c. *vs* Moberly.

CHANCERY.

ERROR TO THE MONTGOMERY CIRCUIT.

Case 83.

Mortgages. Sureties. Contribution. Parties.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 25.

IN February, 1841, James B. Moore being indebted to T. J. Moberly, by note, in a considerable sum, and owing

Case stated.

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Moore, &c. vs Moberly.

many other debts in which Moberly was his surety, either alone or jointly with others, executed to Moberly a mortgage upon land and other property, reciting as the consideration of the conveyance, that Moberly was his surety to divers persons not named, and also that he was indebted to him as above stated. The condition of the deed is, that it is to be void if Moore pays to Moberly the amount due him as aforesaid, and pays and satisfies all the debts for which Moberly is his surety, and in all respects keeps said Moberly harmless and free from expense. And Moberly is empowered to sell any of the mortgaged property to pay himself the amount due him, and to raise money to pay off those debts for which he is bound as surety. In April and May, 1841, J. B. Moore assigned to Moberly and L. Moore, who were co-sureties for him in many debts, certain receipts of attorneys or others, evidencing pecuniary demands in favor of the assignor. Some of these assignments purport to be for value received, but they do not otherwise designate any particular purpose or motive, and there was no direction, either verbal or written, as to the disposition to be made of the funds. Nothing was paid or settled as the consideration of the assignment; and the only basis for implication as to its purpose and motive, is found in the facts, that the assignor was greatly indebted; that Moberly was his creditor and also his surety, so far as appears, in all his other debts; that in some he was the only surety, and in others he and L. Moore, the other assignee, were sureties, either alone or with others.

Moberly received the entire proceeds of the mortgage, and also a considerable portion of the fund assigned to him and L. Moore. But the aggregate of these receipts falls far short of the aggregate of his payments for J. B. Moore, including the debt to himself and those in which he was sole surety, as well as those in which he was bound as surety with others.

L. Moore also received a portion, and as we assume, the residue of the fund assigned to him and Moberly, but paid more than he received, in discharge of debts in which he and Moberly, with others, were sureties.

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The debtor, J. B. Moore, has no property to be appropriated towards the satisfaction of the claims against him. And Moberly having filed his bill to obtain contribution for equalizing his loss, the question is presented as to the proper application and distribution of the fund realized under the mortgage and assignment, and as to the liability and rate of contribution to which the other parties are respectively subject.

The object of the bill.

1. The mortgage being made to Moberly alone, places the legal title and the immediate control of the property in his hands. But the whole instrument shows that he has the title for the benefit of others as well as himself. The condition is for the payment of the debts in which he is surety, as well as of those in which he is creditor; and the power of sale is equally comprehensive in its objects. There is no full performance of the duties of the trust, nor satisfaction of the expressed objects of the deed, until all the debts referred to are paid, or the mortgaged property exhausted by fair appropriation. The mortgage in this case is, therefore, a security for the debts in which Moberly was surety, as well as for that in which he was creditor; and as no discrimination is made, it is equally a security for all. He might, with the assent of the debtor, have secured a precedence to his own demand. But having failed to do so, the mortgage must be understood as intending to place all the debts in which he was interested, on the same footing, and as entitling each to its *pro rata* share of the security. As the indemnity was provided for the satisfaction of all the debts referred to, without discrimination, and might have been resorted to for that purpose by all, and should, if sufficient, have been applied to the full satisfaction of all, so upon its proving insufficient, the loss should fall proportionally upon all, and all should participate proportionally in the benefits.

A debtor mortgaged property to a creditor who was also a surety for the mortgagor separately in some cases, and jointly with others in other cases, the mortgage to be void on the payment of the debts to the mortgagee, and satisfying all the debts in which the mortgagee is surety, and keeping him free of expense, the mortgagor assigned to the mortgagee and another surety, money securities assumed to be for the same object.—Held that the security should be appropriated to the *pro rata* payment of all the debts, as well that due the mortgagee as those for which he was surety.

If no part of the mortgage debts had been paid, and all the creditors were before the Court for the appropriation of the common indemnity, it would on these principles, be distributed among them in proportion to the several amounts of their respective debts. To the extent that payment had been made by a surety, he would be

In such case, if no part of the debts secured by the mortgage had been paid and all the creditors before the Court, a *pro rata* distribution would have been proper in

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entitled to occupy the place and enjoy the right of the particular creditor, receiving his *pro rata* share of the indemnity, and leaving the residue of his payment as a loss to be borne by himself, if he were sole surety, or to be equalized by contribution from his co-sureties, if there were any bound for the particular debt. His co-sureties being thus relieved from the burthen of contribution to the extent that the indemnity is applied to their debt, would partake in this manner of the benefit of the indemnity. And they have a right thus to participate, which a Court of Equity will regard and enforce.

case of a deficit, and the debts were in part paid by the sureties, they or either should be substituted to the place of the creditors, the mortgagee will thus receive only his *pro rata* of his own debt with other creditors.

According to this view of the case, Moberly had a right to apply towards the satisfaction of his separate debt, and of the demand arising from his payments as sole surety of the mortgagor, so much of the fund realized from the mortgage as would fall to the share of these when compared with the whole amount of debts secured by the mortgage. And as his payments of debts in which he was only a co-surety with others, place him precisely on the same ground, the result is, that he is entitled to claim on account of his own debt, and of the payments made as surety, whether sole or joint, only a rateable share of the mortgage fund, bearing the same proportion to the whole fund, that his entire demand compounded as above, bears to the aggregate amount of debts referred to in the mortgage. And this indemnity should be distributed rateably among the several debts which make up his claim, whereby the loss upon each debt being ascertained, may be distributed if there be others subject to it.

The case of *Moore* vs *Moore*, (4 *Hawks' N. C. Rep.*) distinguishable from this case.

The case of *Moore* vs *Moore*, in the Supreme Court of North Carolina, (4 *Hawks*, 358,) referred to in opposition to the principles thus applied to the case before us, decides that where one surety had willingly entered into the engagement without indemnity, and upon additional surety being required before the bond was accepted, the other refused to go in without indemnity, and the mortgage was made to him alone, (but conditioned to pay the debt by the principal,) with the first surety as a subscribing witness. These circumstances excluded the presumption of a community of burthen and of means and

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efforts for relief, and therefore that the first surety was not entitled to equal benefit from the mortgage, and that each having paid one half of the debt for which they were bound as sureties, the first could not call upon the second for contribution, although the latter may have realized the indemnity to the extent of his payment; and that at most the first surety could only claim for his own reimbursement, the excess of the mortgage fund after the second was fully satisfied. The propriety of the decision in reference to the particular case, may perhaps be questionable. It does not, however, controvert, but rather admits that, except under special circumstances, the principle of equality among co-sureties will prevail as corresponding with the presumed intention as indicated by the mutuality of interest and duty, and it does not deny, but rather admits that the mortgage though made to the surety, was available to the creditor.

A mortgage, by a debtor to his sureties, is in effect a security for the debt. (4 *B. Monroe*, 142; *Ibid*, 531;) so a mortgage to secure several co-sureties is, in the absence of special circumstances, to be applied as if still the property of the debtor. (7 *Dana*, 307; 6 *B. Mon.* 206.)

The cases of *Bronston* vs *Robinson*, (4 *B. Monroe*, 142;) *Waller* vs *Tate*, (*Ibid*, 531,) and other cases, show that a mortgage by a debtor to indemnify his surety in a particular debt, is in effect a surety for the debt, and available as such to the creditor. The cases of *Morrison* vs *Poyntz*, (7 *Dana*, 307;) *Clay* vs *Goodloe*, (6 *B. Monroe*, 236, *&c.*,) show that the property thus mortgaged to one of several co-sureties in several debts is, in the absence of special circumstances, to be applied as if still the property of the debtor, to the exhoneration of all, by a *pro rata* payment or reimbursement of the several debts, leaving the deficit of each to be made up by contribution. They are therefore referred to as sustaining the rule above laid down for distributing in this case the benefit of the mortgage and the burthen of contribution. Moberly must lose on his separate claim for his own debt, and for payments as sole surety of J. B. Moore, in proportion to the amount of that claim compared with the total amount of debts and the whole loss thereon. And we perceive no principle on which he can compel his co-sureties and co-beneficiaries of the mortgage fund, to make up to him the deficiency of that fund, except so far as they are bound with him to bear the common burthen

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MOORE, &c. vs MOBERLY.

of the common debts, after applying to them a rateable share of the common indemnity.

In suits for contribution among sureties, all interested are necessary parties.

2. The funds arising from the assignments to Moberly and L. Moore, stand, in our opinion, on precisely the same footing as those raised from the mortgage. The assignments were clearly in trust for the payment of debts, and there being no designation of any particular debt to be paid, it must be regarded as a fund for the payment of such debts at least as the assignees, or either of them, were interested in. There is no sufficient presumption that it was intended to exclude those debts in which one of the assignees was alone concerned, any more than that the mortgage was intended to prefer those debts in which the mortgagee was alone interested as creditor or sole surety. The two funds are therefore to be considered, for the purposes of this case, as constituting one fund, to be applied or distributed *pro rata* among the several debts or classes of debts referred to, and leaving the residue of each debt or class as a loss to be borne rateably by the several sureties therein, if there be several, or by the single surety where there is but one, or by the creditor where there is no surety.

3. The right of L. Moore, in consequence of payments made by him, are the same as those of Moberly, arising in the same way; and each being liable to contribute to the other, a comparison of these liabilities will ascertain the sum to be decreed against the one or the other. The other parties having no claims of this kind, are liable to contribute to the party (Moberly or Moore) who may have made payments for them respectively, in proportion to the loss arising on such payments, after applying the indemnity.

4. By the decree the defendants were compelled, not only to pay to Moberly the sums indicated by the rule of contribution above laid down, but also to make further contribution for equalizing or reducing the loss upon his separate claim, after applying thereto its rateable proportion of the indemnity. The decree being thus too favorable to Moberly, cannot be reversed on his cross errors, which are, in effect, overruled by the foregoing opinion. But for the error of decreeing against each of the defend-

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ents more than his rateable share of the loss in the debts in which he was surety, the decree is reversed and the cause remanded for a decree to be rendered in conformity with this opinion. It being understood that this mandate does not preclude either party from pointing out, nor the Court from correcting any error of calculation or distribution in that part of the commissioner's report which seems to conform to the rule herein laid down; and it will be proper, upon the return of the cause, to bring before the Court as parties, Munday and Bush, who appear to have been sureties in some of the debts paid by L. Moore, and who being interested in the proper application of the indemnity, and personally bound to contribute, ought to be bound by the decree, and are, therefore, proper parties, though no contribution is now sought against them.

Eginton for plaintiffs; *Apperson* for defendant.

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Smith *vs* Thompson's Heirs.

CHANCERY.

ERROR TO THE HOPKINS CIRCUIT.

Case 84.

Attorney and client. Fraud.

JUDGE SIMPSON delivered this opinion of the Court.

June 25.

Case stated.

PHILIP THOMPSON, in his lifetime, had been for many years, acting as the counsel and attorney of the complainant, Moses F. Smith, in the management of a considerable estate, which he claimed as devisee, under the will of his uncle, William B. Smith. By the contract between the parties, Thompson was to attend to the settlement of the whole business, defending such suits as had been brought for any portion of the land devised, and prosecuting any suits that might be necessary to the complete settlement of the estate. A certain specified portion of the estate devised, was designated and set apart for the use of Smith, to which he was to have the exclusive right, the residue of it, after the payment of all the costs incurred in its investigation and adjustment, was to be divided equally between the parties.

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SMITH vs THOMPSON'S H'S.

The estate which was subject to division under this contract, consisted of a considerable body of lands in the county of Henderson, the legal title to which, had been conveyed to a certain William R. Griffith, for the ostensible purpose of indemnifying him as the security of the devisee, Moses F. Smith, who had qualified as the executor of his uncle's will, and had given Griffith as security in the bond.

Whilst affairs stood in this attitude, and before any final adjustment of the estate had been made, and whilst Thompson was still acting as the counsel of Smith, he entered into a contract with a certain Memucan Allen to bring a suit in chancery for him, against Smith. A judgment had been obtained in the name of Daniel J. Smith against the executors of William B. Smith, on which an execution had been issued, and returned, no property found. This judgment, including debt and interest, amounted to upwards of twenty eight hundred dollars, and a transfer of it had been obtained by Allen. It was agreed between Allen and Thompson, that a suit in chancery should be instituted for the purpose of subjecting to the payment of that debt, as well the aforesaid lands in Henderson county, as also another tract of eight or nine hundred acres, in the county of Daviess, being the same tract of land, which, by the contract between Smith and Thompson, belonged exclusively to Smith, the legal title to all of it being in Griffith. The whole of the land in both counties, was to be purchased under the decree, and divided between the parties. Thompson, for his part, was to have one thousand acres of the land in Henderson county, on the north side of Green river, and Allen was to have the residue of the Henderson lands, and also the tract of eight or nine hundred acres in Daviess county, all of which the parties contemplated purchasing under a decree to be obtained in that suit.

The suit was accordingly brought, and after it had been pending upwards of a year, Thompson and his client, Smith, entered into a written agreement, by which it was stipulated that if Thompson would get a decree for Allen against Griffith, Smith would procure Allen to bid the whole amount of the sum decreed, for the land in Daviess,

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and Thompson was to have all the unsold land in Henderson's grant, except two hundred and fifty acres reserved for Daniel Smith. The answers of Smith and Griffith were filed, consenting to a sale, Griffith, however, upon the condition that the Court in decreeing a sale, should also decree a credit to the executor, so as to release him as the security.

The suit was managed on both sides by Thompson, a decree for a sale of the whole land was rendered, and a commissioner appointed, who afterwards returned a report, stating that Allen became the purchaser of the land in Daviess, at the price of one hundred and fifty dollars, and Thompson the purchaser of the lands in Henderson, for the sum of twenty five dollars.

A written ratification of the commissioner's sale by Smith, was afterwards procured by Thompson, in which Smith gives up to him all the land in Henderson county, on the north side of Green river, and to Allen all the land on the south side of that river, to pay legacies for which Smith was bound.

After this writing had been executed, the commissioner who made the sale having died, another was appointed by the Court to convey the land to the purchasers. Before, however, the commissioner had acted under the order, Smith brought this suit in chancery, to prevent the execution of the decree—to have the sale vacated upon the ground of fraud, and to compel Griffith to convey to him the legal title. Upon hearing, the Court below dismissed his bill, without giving him any relief whatever.

The management of this suit, brought in Allen's name as complainant, presents the extraordinary scene of a lawyer conducting a suit on both sides, having separate and distinct contracts with the complainant and defendant, and finally purchasing at a sale controlled and superintended by himself, a large tract of land, of the value of several thousand dollars, for the small sum of twenty five.

The motive that influenced Smith to enter into the contract in relation to the suit, is involved in considerable mystery. Allen's conduct throughout, is equally inscrutable; the inference from what does actually appear, be-

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SMITH vs THOMPSON'S H'S.

ing strong, that they were all acting in concert to accomplish some end that is not avowed or made manifest. Smith may have been induced to believe it important that he should get the title from Griffith. The object of Thompson, however, is perfectly obvious. It was to secure to himself, a large and valuable tract of land, exceeding considerably the part to which he was entitled under his contract with Smith, for the settlement and adjustment of the whole estate.

Whatever may have been Smith's object in consenting to the prosecution of this suit in chancery in the name of Allen, to subject to sale the whole of his land in the counties of Daviess and Henderson, and whatever influences may have been brought to bear on him to induce him to ratify the sale, after it had been made, it is clearly manifest, that the operation has resulted greatly to his prejudice, without having ever promised, so far as he is concerned, a more favorable termination.

The counsel of a party who deceives him by false representations on his part, or who knowingly permits his client to be deceived by the representations of others violates the duty arising from that confidential relation, and will not be permitted to avail himself of any contract made under such circumstances.

The conclusion is, therefore, irresistible, that he acted throughout under a strong delusion. If it were produced by the representations of Thompson, or knowing its existence, as he must have done, Thompson failed, so far as practicable, by his advice and counsel, to remove it; in either case he was violating the duty that grew out of the confidential relation that existed between him and his client, and will not be permitted to use an advantage resulting from such violation of duty. The purchase, therefore, if invalid in itself, cannot be legalized, by the subsequent ratification of Smith, obtained under such circumstances.

If the sale made under the decree, cannot be sustained upon the ground that it was sanctioned by Smith, it is apparent that it cannot be sustained at all. The purchaser is the attorney who managed the sale. The price paid by him is so inadequate as to evince, if not unfairness, at least mismanagement in conducting it. Allen, who is reported by the commissioner to be purchaser of the land in the county of Daviess, was not at the sale when it was made, and disclaims the purchase. Thompson never paid even the small sum bid by him, and the whole demand due to Allen has since been paid by the com-

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plainant; all going to prove that the parties themselves, regarded the sale as a mere form, to effect some object, which has not been revealed by them or developed by the proof in the cause. This deduction is fortified by the fact, that although the sale was made by the commissioner in 1832, no deed had been made to the purchasers under the sale, when this bill was filed in 1838.

An attorney who conducts a suit by which property is subjected to sale, and who to some extent has power over the sale, will not be protected in his purchase of the property at a sacrifice. (3 *Dana*, 614; 7 *Ibid*, 388; 2 *B. Mon.* 497.)

The same principle which would prohibit trustees and public officers from buying property of which they have the management, at a sale thereof, made and controlled by themselves, would seem to forbid an attorney, who manages the suit for the complainant, and has the right to control, to some extent, the sale made by the commissioner, to become a purchaser at such sale. Particularly ought a purchase, under such circumstances, to be regarded as invalid, when it results in a sacrifice of the property, which might be prejudicial to the complainant in the suit, and beneficial alone to the attorney who purchased. This doctrine has been advanced and advocated, if not expressly sanctioned by this Court: *Foreman, &c.* vs *Hunt, &c.* (3 *Dana*, 614;) *Howell's heirs, &c.* vs *McCreery's heirs, &c.* (7 *Dana*, 388;) *Busey* vs *Hardin, &c.* (2 *B. Monroe*, 407.)

In the case now under consideration, however, if the attitude of the purchaser, and his relation to the parties to the suit, did not preclude him from purchasing, it is sufficient in conjunction with the other circumstances attending the transaction, and giving character to it, to render the purchase invalid, and to authorize, indeed imperatively require the Chancellor to set it aside and disregard it.

The effect to be produced by this step, on the rights of the parties, forms the next subject of inquiry.

On behalf of the complainant, it is urged that the contract entered into by him and Thompson in 1819, should not be considered obligatory, because it was made after Thompson had been employed by him as his counsel to establish the will, and that being his counsel, he took advantage of his situation, to obtain from him a contract for an unreasonable and exhorbitant fee, greatly beyond what was necessary to afford him a full and fair compen-

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SMITH vs THOMPSON'S H'S.

sation for his services, and because, as contended, the contract is champertous; and consequently, upon setting aside the purchase made by Thompson, the whole land should be decreed to the complainant.

A contract between attorney and client, after a lapse of near twenty years, by which the attorney was to have an interest in the subject in litigation, having been acted upon by the parties, though it might appear unreasonable now, owing to the enhanced value of the land, the subject of litigation, permitted to stand when assailed by one party.

This contract had been acted under by the parties, and acquiesced in by the complainant, for almost twenty years before the institution of this suit. It may have been, in its origin, liable to the objections urged against it. It must be recollected, however, that the extent of the service required, and the length of its duration were uncertain. The value of the land has greatly enhanced since that period, and appears now to be a much greater compensation than it really was when the contract was made. It seems to us, therefore, in consequence of the great lapse of time, the acquiescence of the complainant, the services rendered by Thompson, and the uncertainty of the facts upon which it is now attempted to be assailed, the contract should be regarded as obligatory on the parties. If, as contended, Thompson violated this agreement, and acted inconsistent with the duty that it imposed upon him, in bringing the suit in chancery in the name of Allen, against his client, still that would not authorize its rescission, but would only require the interferance of the Chancellor, to protect Smith from all injury that might result from such violation.

From the nature of this contract, and the objections that are made to it, it may be that the Chancellor would not, if application for the purpose were made by Thompson or his representatives, enforce it at their instance. But when a party presents himself in a Court of chancery, seeking its aid and interposition, he is required to do what is fair and equitable upon his part. Although, therefore, the Court might not be authorized according to equitable principles, to regard the contract as obligatory on Smith, if he were a defendant, and might refuse to decree its specific execution, yet if it be just and proper that he should comply with it, the Court will give him relief only upon the condition that he submits to this equitable requisition.

We are of the opinion, that upon this principle, Smith must yield to Thompson's heirs that part of the land in

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Henderson county, to which they are entitled, under a fair construction of the contract of 1819. By the terms of this contract, the slaves and ferry tract of land, are to belong exclusively to Smith. Out of the whole balance of the estate, the debts and specific legacies, all the cost incurred in establishing the will, except fees to counsel, and all other cost and expenditure arising from the settlement of the estate, and the adjustment of claims on the land devised, are to be deducted, and the residue is to be equally divided between the parties. If the personal estate which came to the hands of the executors, was inadequate to the payment of the debts and expenses of the administration and specific legacies, then there will be a charge upon the real estate to the extent of the deficit.

It will be necessary, therefore, to have a settlement of the executorial accounts, if one has never been made, to ascertain the facts, that the Court may be enabled to determine whether there is any charge on the land in favor of either party, which will have to be taken into the estimate in making a division of the estate under the contract.

In making partition of the land, so much thereof as has been heretofore appropriated by sale or otherwise, by either of the parties, if it do not exceed the quantity to which such party may be entitled, should form a part of his portion, to be estimated at its value in the condition it was when so appropriated.

The decree which has been obtained in the name of Allen, for the sale of the land, as well as the judgment at law, upon which that decree is based, should be perpetually enjoined, as the debt has been fully paid and discharged by the complainant; and the purchase at the commissioner's sale, should be vacated and annulled.

When the land that each of the parties has a right to under the contract, has been designated by the action of the Court, Griffith should be compelled to re-convey to Smith the ferry tract of land, and all the other land that may fall to him in the division, and also to convey to Thompson's heirs the land allotted to them, retaining in each conveyance however, a lien upon the property, for

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HOPKINS, &c. vs GARRARD.

his indemnity as security in the bond given by the complainant, as executor, in the County Court.

The deed made by the complainant to Riley during the pendency of this suit, forms no obstacle to the relief sought for by him. The law against champerty has no application in a controversy of this kind.

The Circuit Court having dismissed the complainant's bill, and refused to give him any relief, the decree must be reversed, and cause remanded for further proceedings in conformity with the principles of this opinion.

Morehead & Reed for plaintiff; *Harlan & Craddock* for defendants.

CHANCERY.

Case 85.

Hopkins, &c. *vs* Garrard.

ERROR TO THE PENDLETON CIRCUIT.

Vendor's lien. Notice. Lis pendens purchasers.

June 26.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

A defendant may sell land which he has purchased, though a suit may be depending to subject it to the payment of the unpaid consideration, the purchaser being subject to the equity of the complt's bill.

So much of the decree as annuls and sets aside the deed from Hopkins to the Fees, is final, and clearly erroneous. The deed is not void, because it was made pending the suit to subject the land to payment of the purchase money due from Hopkins to his vendor, Garrard, but is only liable to be overreached and rendered inoperative by the result of the suit, and so far only as may be necessary to effectuate that result. The title passed by the deed subject to be divested by a sale and conveyance under the decree, for the satisfaction of the vendor's lien. As to any part of the land not thus sold, the *pendente lite* purchaser is entitled to retain the title. And he has a right, before an actual sale, to free it from the incumbrance, by paying up the arrears of the purchase money. The decree annulling his deed, deprives him of these rights. As at the date of the deed from Hopkins, the pending suit had no other object but to subject the land to payment of the first instalment of the purchase money; and as the deed from Garrard to Hopkins acknowledges the receipt of the entire consideration, there is much rea-

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son in the argument, that the title under the deed from Hopkins, should not be affected by the mere pendency of the suit, except to the extent of the instalment demanded by the original bill, and which was the only claim set up and pending when the deed was made.

The vendor remaining in possession of land sold and conveyed, is sufficient to put a subsequent purchaser upon inquiry as to the payment of the consideration.

But the fact that, notwithstanding his deed to Hopkins, which acknowledged full payment, Garrard, the grantor, remained in possession of the land, was an indication that he had or claimed some interest in the land, and should have put the subsequent vendees on an inquiry by which they would have easily learned that the purchase money was, in fact, unpaid, and probably that Garrard was holding the possession as a security for it. On the ground of notice, therefore, implied from this possession, the lien of Garrard for his purchase money, is considered effectual against the subsequent purchaser, even beyond the effect of the *lis pendens*. It was, however, even in this view, erroneous to annul the deed. This part of the decree must, therefore, be reversed. The residue of the decree being interlocutory, is not subject to reversal. But we suggest that it seems improperly to have omitted a credit of $20, entered on the note exhibited by the complainant; and also a credit for five dollars paid by Rice, and $14 50 paid by Culp; and the rent should have been credited at the rate of $60 a year. The acceptance of the deed by Hopkins, with the knowledge of the deficiency in the quantity, and his expressions of satisfaction, would seem to preclude his claim to a deduction in the price. These suggestions can have no effect, if that part of the case to which they relate has been finally disposed of.

Wherefore, so much of the decree as annuls the deed from Hopkins to the Fees and sets it aside, is reversed and the cause is remanded.

Swope for plaintiffs; *Trimble* for defendant.

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COVENANT.

Pindell, assignee *vs* Maydwell.

Case 86.

ERROR TO THE FAYETTE CIRCUIT.

Limitation. Process. Suits..

June 28. JUDGE SIMPSON delivered the opinion of the Court.

SAMUEL BEACH having filed an answer which he prayed might be considered a cross bill against his co-defendant, Maydwell, in a suit in chancery pending in the Fayette Circuit Court, in which Beach and Maydwell were both defendants, but having failed to sue out process thereon, the plaintiff in error, some considerable time afterwards, exhibited in his own name, as assignee in bankruptcy, a bill purporting to be an amendment to the cross bill of Beach, had a chancery subpœna issued thereon, and executed on Maydwell. Thereupon Maydwell filed his answer, relying, among other matters of defence, upon the statute of limitations.

The date of the issue of process is the commencement of a suit—so is the service of notice in ejectment.

Whether he can avail himself of the statute or not, depends upon the time the suit shall be considered as having been commenced. The suing out process has always been held the commencement of an action or suit: (7 *Monroe*, 111.) It has also been held that the service of the notice in ejectment is the commencement of the action, although the suit is not pending until the return of the notice, and the filing of the declaration and notice in Court.

The date of the subpœna in chancery, which is sued out and returned or placed in the hands of the officer, is the commencement of the suit.

In bringing a suit in chancery, the first step taken by the complainant, is to file his petition or bill, and hence writers on this subject frequently speak in general terms of this act, as the commencement of the suit. But so far as it relates to the defendant, the suing out process against him is the commencement of the suit; preferring the bill being only preparatory to this being done.

The propriety of the adoption of this principle is illustrated very forcibly by the proceedings in the present case; no process had been issued on Beach's cross bill for upwards of three years, Maydwell was not bound to

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notice it, and no suit was actually pending against him on the cross bill, until process issued thereon in the name of the plaintiff in error, on his bill purporting to be an amendment thereto.

The filing of a bill in chancery, without suing out process thereon, will not be regarded as commencing a suit.

When a party attempts, at law, to avoid the application of the statute, by showing that the first writ was sued out in time for this purpose, although the subsequent one was after the time, it has been held that he must show the first writ not only to have been issued, but to have been returned: *Harris* vs *Woolford*, (6 *Term Rep.*, 617.) As the Chancellor applies the statute, in analogy to its application by a Court of law, it follows that where a party files a bill in chancery and neglects to take out process, the statute still continues to run against him, and he cannot avoid its effect by showing that he lodged his bill in the Clerk's office, or even filed it in open Court, before the time had expired. It is obvious that, although it might remain in that condition for any length of time, there would be no suit pending against the defendant, and if when process issues, at any subsequent period, no matter how distant, it should be considered as relating back to the time when the bill was filed, such a doctrine would have the effect of encouraging negligence on the one hand, and of defeating on the other, the object of the statute, which was intended to obviate any injustice that might arise from the absence of testimony, supposed to have been lost, or forgotten through the operation of time.

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As the statute of limitations must have its effect in this case, and as it is decisive of the fate of the complainant's claim to relief, it is unnecessary to notice the other questions presented.

The Circuit Court having dismissed the complainant's bill, its decree is affirmed.

Pindell for plaintiff; *Sayre* for defendant.

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Pet. & Sum. Case 87.

Campbell & Co. *vs* R. B. Todd & Co.

ERROR TO THE FAYETTE CIRCUIT.

Evidence of parties to the record. Witness.

June 29.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

THIS was an action by petition and summons against R. B. Todd and J. A. Hampton, upon a note executed by Todd in the name of R. B. Todd & Co. for the price of goods purchased by him from the plaintiffs. Hampton pleaded *non est factum*, and denies that he was a partner. Todd made no defence, but there was no judgment by default against him. On the trial of the issue on Hampton's plea, the plaintiff entered a conditional dismission of the suit as to Todd, to be absolute if the issue should be found for Hampton, but to be void if found against him. Todd also executed a release to Hampton of all claim to contribution on account of losses and deficiencies in the business of R. B. Todd & Co., containing also, an acknowledgment of his own liability for all payments made or to be made by Hampton, on account of such losses or deficiencies. In this state of case, the plaintiffs offered Todd, with his consent, but against the consent of Hampton, as a witness to prove the partnership, and the issue having been found against Hampton and judgment rendered against both defendants, the sole question is, whether the Court erred in allowing Todd to depose as a witness.

The general rule is, that a party to the record is not a competent witness in a trial at law—there are exceptions. See the case.

If it be conceded that all objection on the ground of interest, was removed by the release and the conditional dismission as to Todd, the objection still remained, that the suit, as to him, was still pending, not being determined either by judgment or *nolle prosequi*, and that he was, therefore, in the fullest sense, a party to the record. The general rule is well settled, that in a trial at law, a party to the record cannot be examined as a witness, and this rule is enforced with peculiar rigor against the plaintiff who would make a witness of a defendant. In the

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case of *Scott* vs *Lloyd*, (12 *Peters*, 149,) the Supreme Court of the United States, most emphatically deny the doctrine that a party named upon the record may be released so as to make him a competent witness, on the ground that such a proceeding would hold out to parties a strong temptation to perjury, and they say it is not sustained either by principle or authority. The grounds of policy referred to in the case cited, and on which the rule is based, cannot be obviated by the consent of the witness himself, if there be other parties on his side whose interest is to be affected by his testimony. The rule of exclusion may, indeed, be waived by the party for whose benefit it would operate. But the right to waive or insist upon it belongs to the parties collectively, or at least to those who are interested in the protection which it affords, and cannot be exercised for all by one individual of the collective party, who may have no interest in the application of the rule: (*Greenleaf on Evidence*, 399.)

The general rule as stated above, is laid down by all the elementary writers and declared in adjudged cases too numerous for citation. There are cases in which the plaintiff may, by entering a *nolle prosequi* against one defendant, make him a competent witness against others, or when one defendant being acquitted, may become a competent witness for the others. In such cases, however, the witness is completely disengaged from the suit, and is no longer a party to the record. Whether a judgment by default would place him in a like condition, need not be determined. We perceive no sufficient ground for making this case an exception to the general rule, and are, therefore, of opinion that the Court erred in overruling the objection of Hampton, to the competency of Todd as a witness.

Wherefore, the judgment is reversed and the cause remanded for a new trial.

Robertson for plaintiff; *Robinson & Johnson* for defendants.

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CHANCERY.

Case 88.

Brown, &c. *vs* Combs, &c.

APPEAL FROM THE WOODFORD CIRCUIT.

Execution Sales. Purchase under execution.

Sept. 29, 1846.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court, which was suspended until the 29th June, 1847, when the suspension was removed.

A purchaser under execution will hold against the vendee by parol of the defendant in the execution.

THE alledged executory agreement of 1835, between Stanton's heirs and Smith, being in parol, could not have been enforced against the subsequent purchase of Divine, under the execution against Stanton's heirs. But Divine having received a conveyance from the Sheriff, might have retained the title, and recovered the land, subject at most to a lien for the reimbursement of the $250 which Smith had paid. The reversal of the judgment under which he had purchased, threw no difficulty in the way of his retaining the title or recovering the possession; and whether Stanton's heirs or the plaintiff in the reversed judgment, should have the price of the land, was a matter of no interest to him. He would in the one case as much as in the other, have been entitled to withhold any sum which Smith should rightfully reclaim from him on account of the prior parole purchase. And the question who should have the money arising from his own purchase, would be just as immaterial to him before as after he should make payment.

Had Divine, then, upon being informed of the reversal of the judgment under which he had purchased, a right to decide at once and for himself, that Stanton's heirs were entitled to the price, and to discharge himself from his obligation to the plaintiff, by paying the price to Stanton's heirs, or by surrendering his claim to the land to them or their vendee, Smith? If his liability to the plaintiff had then stood upon the sale bond given under his execution purchase, would such a payment to Stanton's heirs, or such arrangement with them, unauthorized by any order of Court, have been a sufficient ground for quashing an execution on the bond issued after the plain-

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tiff had obtained a second judgment? Would not Divine, in acting upon the fact of reversal, have been bound to know that the case was remanded for further proceedings, and that the plaintiff was still maintaining his claim, and might again recover judgment? Would the Court, upon the cause being remanded for further proceedings, have granted at once, and as a matter of course, the motion of Stanton's heirs, to direct the money due on the sale bond to be paid to them? Or would it for their benefit, and as a matter of course, have sanctioned an arrangement, by which, without the consent of the plaintiff, they would be enabled to withdraw from his reach both the land and its price? If this be doubtful, much more is it doubtful whether Divine and Stanton's heirs could by their own agreement, have thus affected the interest of the plaintiff, and whether, by their mere agreement, Divine's liability on the sale bond could be discharged, and his purchase under the execution be rescinded, so that the land might be conveyed to Smith.

A sale was made of land, and a deed made by the Sheriff to the vendee of the purchaser, and the purchaser under the execution gave his negotiable notes to the plaintiff in the execution, and the execution on the sale bond was returned satisfied.—Held that the purchaser could not in equity be relieved from liability upon his negotiable notes given to the plaintiff in the execution in lieu of the sale bond and as satisfaction thereof.

But if Divine, as purchaser under the execution, standing bound in the sale bond for the price of the land, had a right to discharge himself and give up his purchase, by arrangement with Stanton's heirs, and without regard to the interest of the plaintiff, it does not follow that he had the same right, after he had by the execution of his own note to the plaintiff, with surety for the amount due on the sale bond, procured the return of satisfaction on an execution which issued on the bond, and after having, with his friends, made a bill of exchange for the purpose of paying this note, which with their assent, and upon their solemn promises of punctual payment, was endorsed and negotiated by the plaintiff's attorney, to raise the amount due on the note. These additional transactions, constituting private and personal engagements on the part of Divine and his associates, and subjecting the plaintiff or his attorney to responsibilities on the bill of exchange, more extensive than their mere liability to restitution of the proceeds of the sale, must also be regarded as changing the nature of Divine's liability, and of the rights which he may have had if the case had stood upon the sale bond. That instrument having been taken in the

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BROWN, &c. vs COMBS, &c.

regular course of legal remedy, was in effect a part of it, and may have been subject to its vicissitudes, to the adverse and changing rights of the parties to the suit, and to such right of restitution as the defendant had, upon the reversal of the judgment under which it was taken. Divine, as the obligor, was thus connected with the legal proceedings in the suit, and subject to any order of the Court respecting the payment of the bond. But the sale bond having been satisfied, and Divine's liability resting on a private engagement to the plaintiff, he had no further connection with the legal proceedings, and was subject to no order growing incidentally out of it. An order of restitution would have been against the plaintiff alone, who had received satisfaction of the bond, and could not have affected Divine's engagement to the plaintiff, over which the Court had no power.

In making the arrangement by which Divine agreed that the land might be conveyed to Smith in discharge of his own liability for the price, the parties assumed in the first place, to decide that Stanton's heirs were absolutely entitled to restitution of the proceeds of sale from the plaintiff, and in the second place, that Divine being indebted to the plaintiff for the price of the land, had a right, at his own will, to discharge his debt to the plaintiff, by discharging the claim of restitution against him. Under color of these rights, Stanton's heirs by his consent, convey the land to Smith, and Divine and his associates claim that they are thereby discharged from their engagements to the plaintiff, who, if the transaction be effectual as contended, is not only deprived of the means of making his debt, but is subjected to the additional loss which may have been incurred in paying the protested bill.

We say Divine and Stanton's heirs had no right thus to dispose of the plaintiff's demand against the former. If Divine actually surrendered his title to the land, with the intention of thereby discharging the claim of Stanton's heirs against the plaintiff, and that of the plaintiff against himself, as he and Stanton's heirs had no right to dispose of the plaintiff's claim, the utmost effect of the arrangement was to make Divine the purchaser and assignee of the claim of Stanton's heirs against the plain-

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tiff. And as the Chancellor would have enforced their claim of restitution against the plaintiff, only by giving credit on the plaintiff's demand against them, we do not perceive upon what principle of equity, Divine, who without necessity, and with his eyes open, and in disregard of the plaintiff's interest and of his own obligations, purchased the right of Stanton's heirs, can claim to stand in any better condition than they themselves would occupy.

A purchaser of property under execution issued upon a judgment which is afterwards reversed, still holds the property purchased.

The reversal of the first judgment against Stanton's heirs did not affect the consideration of Divine's debt to the plaintiff, because it did not affect the validity of his purchase of the land. If he has given up that purchase and thereby lost the consideration of his liability, it was his own voluntary act, and he and not the plaintiff, whose interest he should have regarded, but has, perhaps, intended to injure, should be the loser. Even if there was no intentional bad faith on his part towards the plaintiff, his claim to be discharged from his debt in consequence of his own arrangement with other debtors of the plaintiff, has no equity in it. He stands at best, as the assignee of Stanton's heirs, of their claim against the plaintiff, arising incidentally in the prosecution of his older and larger demand against them, and he unnecessarily purchased the claim in furtherance of a transaction obviously tending to injure the plaintiff and so intended by his vendors. His claim to be relieved from his debt to the plaintiff in consequence of this transaction is, in our opinion, unconscientious and inequitable. The other parties to the bill of exchange, against whom judgment has been obtained, stand of course, on the same ground. Such would be our conclusion even if it were certain that Divine had given up his title to the land and had no indemnity, for he would have brought the loss upon himself voluntarily and without fault of the plaintiff. But while we see in the record a deed from the Sheriff to Divine, and a subsequent deed from Stanton's heirs to Smith, we see no conveyance from Divine, either to Smith or to Stanton's heirs, and for all that appears, the legal title is still in him. If there are equities against it growing out of the arrangement which has been under considera-

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Brown, &c. vs Combs, &c.

tion, they are of his own wilful and wrongful creation, and give him no equity against the plaintiff.

Under these views of the case we are satisfied that the plaintiffs in error have no ground to complain of the decree, so far as it has dissolved the injunctions against the judgments obtained upon the bill of exchange, and given damages on the dissolution. But upon the cross errors assigned by the defendant, in whose name the judgments were obtained, the question arises whether the Court did not err in perpetuating the injunction for the sum of $250, with interest, as being the amount which Smith might reclaim for his payment made to Stanton's heirs, on his parol purchase before the levy of the execution under which Divine bought the land. This was, doubtless, decreed under the opinion that Divine's purchase was subject to the re-payment of this sum of $250, with interest, to Smith. And as we concur in this opinion, it seems properly to follow, that to this extent there was a claim to the purchase money paramount to that of the plaintiff in the execution. If Divine had held the land under his purchase, he would have been liable to pay this sum to Smith, who would have had an equitable lien for it on the dissolution or repudiation of his contract for the purchase, and there is little doubt that the lien would have been asserted, as in all probability it will be, if Divine should yet hold the land, since Stanton's heirs are insolvent. As in that state of case Divine would have had an equity to withhold so much of his debt to the plaintiff, in consequence of a failure, so far, of the consideration, it would seem that if he has, in fact, surrendered the land and thus lost, though wilfully, the whole benefit of his purchase, this circumstance furnishes no reason why he should be subjected to greater loss, or why the plaintiff should have a greater advantage than if the purchase under the execution had been carried out in good faith.

Wherefore, upon the original and cross errors, the decree is affirmed.

Morehead & Reed for appellant; *Robinson & Johnson* for appellees.

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Coleman *vs* Dallam, &c.

CHANCERY.

ERROR TO THE FAYETTE CIRCUIT.

Case 89.

Rents. Femes covert.

JUDGE BIBCK delivered the opinion of the Court.

June 30.

Case stated.

IN 1818, Samuel Meredith being the proprietor of a large tract of land in the county of Fayette, conveyed a portion thereof, by specific boundary, supposed to contain two hundred acres, but be the same more or less, to John Pope, in trust for Eliza B. Coleman, the daughter of the grantor, and her children. In 1823, Meredith conveyed another portion of said tract to his daughter, Letitia Dallam and her children, containing three hundred and fifty acres, be the same more or less.

Prior to the first conveyance, the original line between Meredith's land and the land adjoining, belonging to Mason, had, by parol agreement, been changed, so as to throw on Meredith's side of the old line, a triangular piece of his land into Mason's possession, and on Mason's side, about the same quantity into Meredith's possession. Upon this conventional line the fences were made, and each party continued in possession respectively, of the portion received in the exchange, till after the death of Meredith, when McGuire, a subsequent claimant under Mason, not satisfied with the title, disclaimed to hold by the new line, and the fences were moved back upon the old line.

The deed to Pope, we are entirely satisfied, was not intended, and did not, in point of fact, embrace any portion of the land obtained by Meredith in the exchange, or of that obtained by Mason. It is manifest, the line where it ran on Meredith's side of the old line, constituted the boundary to that extent, of that deed.

In 1823, when the deed was made to Mrs. Dallam, McGuire claimed the Mason land, but no objection appears to have been made to the new line. Her deed calls to run to McGuire's corner, which was an original corner

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COLEMAN vs DALLAM, &c.

before the agreed line was made, and still constituted a corner; and thence with McGuire and Smith's lines till it reaches the beginning corner of Mrs. Coleman's land, embraced in the deed to Pope. If the agreed line is followed, which appears at that time to have been the recognized line, Mrs. Dallam's deed will embrace some twelve or thirteen acres on Mason or McGuire's side of the old line, and will leave out about the same quantity on the Meredith side of that line. It is pretty evident, we think, as the fences at the time ran upon the new line, and as the parties were respectively in possession up to that line, that it was supposed to be the boundary of Mrs. Dallam's tract. But as the call in her deed was to run from McGuire's corner with his and Smith's lines, without calling for particular objects or abuttals, she had undoubtedly a right, and was bound to be governed by McGuire's line, wherever it might be. If there was no line where the fence then ran, binding upon him, she of course could not confine him to any such line. The old line was alone the line to which either party might confine the other. At any rate, it was clearly so as between McGuire and Meredith, and it was always McGuire's line when he chose to claim it. He has abandoned the new and claims the old line, and we are of opinion Mrs. Dallam's deed should, therefore, be construed as running with the old line. Such a construction is manifestly equitable and just, and perfectly consistent with the obvious intention of the grantor. The tract conveyed to Mrs. Dallam is further described in the deed as the *home tract*, on which the grantor then resided. That tract embraced all the land on the McGuire side of the main tract, which the grantor had not previously conveyed to the use of his daughter Coleman. Upon this construction of the deed, it follows that Mrs. Dallam is entitled to that portion of the land in contest, which had been thrown into the possession of Mason, afterwards held by McGuire, by the contemplated new line. By running with the old line it is embraced by her deed. This view of the case does Mrs. Coleman no injustice, as her deed embraces no part of this strip, and she still holds more land than it was supposed to contain. Nor have any of the heirs of Meredith

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any reason to complain, as Mrs. Dallam obtains no more land by running with the old line than with the new. The Court below was, therefore, right in awarding this disputed piece of land to Mrs. Dallam.

The Court will not decree rents when not asked by the pleadings; nor decree rents against a *feme covert*, for lands of the wife occupied by the husband during coverture, though she owned a separate estate.

A question is presented by the assignment of cross errors as to the liability of Mrs. Coleman for rents, as she had been in the possession and enjoyment of the land thus decreed Mrs. Dallam for several years. The Court declined subjecting her to the payment of rent, and we think correctly. No claim for rents is set up in the complainant's bill. Besides, Mrs. Coleman when she obtained possession, was a *feme covert*, her husband died during the pendency of the suit. Under such circumstances she could not be held responsible for the rents, although possessed of a separate estate.

As to the other branch of the case presented by the cross errors, we are also of opinion there is no error in the decree. The call in the deed of Mrs. Dallam, to run with McGuire and Smith's lines, to the beginning corner of Mrs. Coleman, and thence to Mrs. Dallam's beginning, was obviously a mistake. It is clearly to be inferred that the grantor did not intend to convey to her any land embraced in the deed to Pope. In running from McGuire's corner, therefore, the presumption is conclusive, that Mrs. Dallam's line or lines were not to extend farther with McGuire and Smith's lines than to intersect with the line of Pope or Mrs. Coleman. By running to her beginning corner, and thence to Mrs. Dallams' beginning, the deed of the latter would embrace some thirty acres previously conveyed to the former. The boundary of Mrs. Coleman's tract is rendered certain, by particular objects and marked abuttals. Besides, the two tracts have been held, and the rights of the parties recognized, so far as appears, near twenty years, since the death of Meredith, without any reference to this confliction or interference. The Dallam tract was run out by processioners, and no claim seems to have been set up under her deed, to any part of the land included in the deed of Mrs. Coleman. To run strictly according to the controverted call, would moreover throw the tract of Mrs. Dallam into a very singular and awkward shape, such a shape

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VAUGHN'S EX'R. vs GARDNER.

as renders the conclusion almost irresistible that there was a mistake in the call. Upon this ground alone, therefore, the Court was right in not rendering the estate of Meredith responsible upon the warranty in the deed to Mrs. Dallam, for the interference, or the land embraced in common by both the deeds, by running according to the literal call in the last.

The deed to Mrs. Dallam purports to have been in consideration of love and affection and one dollar. An estate during the life of the grantor and his wife, was reserved, and after their death, it was made subject to a charge of $200 per annum, to be paid to Jane Meredith during her life.

To what extent the estate of the grantor should be held liable upon this deed, had the mistake in the boundary not been apparent, we need not decide.

Upon the question of costs, as regulated by the Court below, we are not inclined to interfere.

Wherefore, the decree is affirmed.

Pindell for plaintiff; *Robertson, and Robinson & Johnson* for defendants.

ASSUMPSIT.

Case 90.

Vaughn's Executor *vs* Gardner.

APPEAL FROM THE MARION CIRCUIT.

Joinder of action. Practice at law. Evidence.

June 30.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

THIS is an action of assumpsit, brought by the appellee against the appellant, as executor of Philips W. Vaughn, deceased. The declaration contains counts for work and labor done, and for freight and transportation of tobacco to New Orleans for defendant's testator, and other counts for services of the same kind, rendered for the defendant as executor. Several pleas and a demurrer were filed, and a trial had, which resulted in a verdict for the defendant. A new trial was awarded, on the motion of the plaintiff, and on a subsequent trial, a verdict was given in his favor, on which the Court rendered a judgment; and a new

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trial having been moved for by the defendant and overruled, he excepted to the opinion of the Court, and prosecutes this appeal for its reversal.

Counts may be joined in the same declaration on promises made by the executor, for work and labor done for the testator, with promises made by the testator; but not with promises made by the executor for services performed to the executor as executor, for which he would be individually liable.

The declaration is objected to, on the ground that it includes two distinct causes of action in the different counts; one against the defendant, in which he would be liable only out of the estate of his testator; and the other, in which he would be charged personally. Promises by the defendant as executor, as well as by his testator, to pay for services rendered, for work and labor done for the testator may be joined in the same declaration. In this declaration, however, the promise of the executor is alledged to have been made in consideration of services performed by him as executor. For such services he is personally liable, and a judgment would be properly rendered against him, *de bonis propriis*. On the other counts in the declaration, he is liable only as executor, and the judgment would be *de bonis testatoris*. It is only where the counts are of the same nature, and the same judgment is to be given on them all, that they may be joined. It is evident, therefore, that in this declaration there is a misjoinder of causes of action. The consequences of this misjoinder must be next considered.

When a demurrer and pleas are filed together, and no disposition of the demurrer appears of record, the Court will presume that it was overruled, and the defendant is this Court allowed to rely upon any defect which he might when moving in arrest of judgment.

After the trial of the issues of fact, and a verdict against the defendant, he is not entitled to the full benefit of his demurrer to the declaration, as if no issue had been tried. Where the defendant files other pleas with a demurrer, and a trial is had, and a verdict given against him, the declaration derives from the verdict all the aid it could if there had been no demurrer: (6 *Ben. Monroe*, 379.) It does not appear in this case, that the demurrer was disposed of, but as the Court rendered judgment for the plaintiff, the demurrer must be regarded as having been overruled, and the defendant as standing, in consequence of the verdict, only in the same attitude to question the sufficiency of the declaration, that he would be were he moving in arrest of judgment in the Court below.

Though there be defects or imperfections in declaration, yet if the issue joined

Does the verdict cure the defect in the declaration? Where there are defects or imperfections in the declaration, yet the issue joined be such as necessarily require on the trial, proof of the facts defectively or imperfectly

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stated, or even omitted, and without which it is not reasonable to presume a jury would have given a verdict for the plaintiff, such deficiency is cured by the verdict. But how can a general and indiscriminate verdict cure a misjoinder of causes of action? The verdict of itself, does not enable the Court to determine what cause of action has been made out before the jury, or what judgment should be properly rendered, whether against the executor personally, or of the estate of his testator. It follows, therefore, that the misjoinder of the causes of action is not cured by the verdict.

be such as necessarily to require proof of the facts which should have been averred, and that issue be found for the plaintiff, the defect will be cured by the verdict.

The statute of jeofails of 1796, (2 *Stat. Laws*, 873,) does not apply to a case of misjoinder of counts or causes of action; neither does the statute which declares that a general verdict shall be good, if there be one good count, although there may be also an insufficient one.

The statute of 1799, (2 *Stat. Laws*, 875,) declares that "no judgment, after the verdict of twelve men, shall be stayed or reversed, where it shall appear to the Court, that the merits of the case have been fairly and fully decided by such verdict; and that such verdict, and the judgment thereon, might be effectually pleaded in bar to another suit for the same cause." A bill of exceptions filed in this case, contains all the evidence that was adduced on the trial. So that the record shows what was proved and tried, and enables the Court to determine, whether the merits of the case have been fairly and fully decided by the verdict, and also whether the verdict and judgment thereon, might be effectually pleaded in bar to another suit, for one of the causes of action declared on.

The statute of 1799, (2 *St. Laws* 875,) does not apply to a misjoinder of counts, nor does that which makes a verdict good, if there be one good count and others bad.

All the evidence before the jury went to establish a contract, either express or implied, with the testator in his lifetime, although some of the services under the contract were performed after his death. It thus appears, that the cause of action on the contract with the testator, was the one tried and decided. That the proper judgment against the defendant is a judgment *de bonis testatoris*, and that although the verdict being general, it cannot point to the judgment that should be rendered, yet the evidence in the record enables the Court to determine this matter with sufficient certainty, and thus under the ope-

Where counts on promises by a testator in his lifetime are joined with promises by the executor, yet if it appear from the testimony deduced upon the trial that the evidence was applicable exclusively to the promises by the testator, though partially performed after his

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ration of the statute last mentioned, to prevent this objection from proving so fatal as to produce a reversal of the plaintiff's judgment.

death, the verdict should not be disturbed; but the judgment be *de bonis testatoris*.

We do not know that a construction has heretofore been given to this statute, but as it was intended to be remedial in its operation, we think that the effect we have given to it, in this case, does not exceed that, to which, by a liberal exposition, it is entitled. And indeed this Court, in the case of the *Louisville and Portland Canal Company* vs *Rowan*, (4 *Dana*, 606,) intimate in pretty strong terms, that such might be its effect.

—But if the evidence before the jury authorizes the jury to find for the plaintiff upon either count, the finding will not be aided by the statute.

It is apparent, however, that this statute would not aid a misjoinder, if the evidence before the jury authorized them to assess damages on both counts. In such a case upon a general verdict, the evidence would not direct the Court to the judgment that should be entered, and such uncertainty would still exist, on the plaintiff's declaration, as to demand a reversal of his judgment.

The judgment having been rendered against the defendant, *de bonis testatoris*, and it appearing by the record, that the judgment is such as the evidence warranted, it should not, therefore, be reversed on account of the defect in the declaration.

This conclusion makes it necessary to examine the decisions of the Court below, first in setting aside the verdict in favor of the defendant, and in the second place, in refusing, after the last verdict was given, a new trial on the motion of the plaintiff.

One of the pleas filed by the defendant being a plea of set off, the jury, upon the first trial, found a verdict in his favor of $314 55, in damages; and it is contended, that the Court erred in setting that verdict aside, and granting the plaintiff a new trial.

If the evidence authorized a verdict for the defendant to any amount, which we do not deem necessary to decide, we are satisfied that the verdict rendered was not sustained by the evidence, and that the Court did not err in granting a new trial.

On the last trial, upon nearly the same evidence that was before the first jury, a verdict was given for the plaintiff for $233 50 cents, and the defendant's motion for a

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VAUGHN'S EX'R. vs GARDNER.

new trial having been overruled, the propriety of this decision involves the legality of the opinion of the Court, during the trial, in admitting and excluding testimony.

The extent of the plaintiff's recovery depended mainly on the fact, whether he had in rendering the services sued for, acted merely as steersman in boats owned and furnished by defendant's testator, or whether he had freighted and transported tobacco and other produce to New Orleans for him, in boats belonging to, and furnished by the plaintiff himself. In elucidation of this point, the defendant introduced evidence going to prove that it was customary in New Orleans, for persons acting in the capacity of freighters, to attend to the inspection, weighing and storing of the tobacco freighted by them, and that the plaintiff did not, at any time, when he brought to New Orleans, tobacco belonging to the defendant's testator, attend either to the inspection, weighing or storing of the same, and relied upon this conduct of the plaintiff to prove, that he had only acted as steersman to the boats, and having landed the tobacco, he considered his duties fulfilled, which would not have been the case had he acted in the capacity in which he claimed to have been acting. This evidence was objected to and was excluded by the Court.

Proof of the customary duty of those employed in the performance of any particular service at any particular place which are reasonable, is legitimate evidence in questions involving the rightful discharge of such duty.

The conduct of the plaintiff was clearly admissible in evidence. It tended very strongly to prove the fact it was designed to establish. And we think the custom among freighters in any particular place, was also legitimate evidence, particularly when such custom was reasonable and proper, and such as naturally resulted from a faithful performance of the duties consequent upon the assumption of the character of freighter. More particularly in a case like the present, where the evidence is somewhat contradictory, and circumstantial evidence has to be resorted to, to aid the jury in deciding the issues between the parties. The Court, therefore, erred in excluding this evidence from the jury, and properly admitted the evidence proving the custom of freighters, in Green river in relation to the hiring of hands, and furnishing provisions, &c., which was objected to by plaintiff.

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There was no error in the opinion of the Court, excluding the declarations of the plaintiff in the year 1841, whilst on his way to New Orleans in relation to his claim to the boat he was then in possession of. Whether the boat was furnished by him or by the defendant's testator, was a point in contest before the jury, and that point could not have been illustrated by any claim he might have made as to the ownership of the boat in question.

But as the judgment must be reversed for excluding the defendant's evidence, we will suggest the propriety, on the return of the cause, of the plaintiff's discontinuing so much of his action as is included in the counts in his declaration showing a consideration to the defendant himself, as the foundation of the promise relied on, or that by amending his declaration, he should strike out those counts, so as to obviate the objection to it, on the ground of a misjoinder.

The judgment of the Circuit Court is reversed, and cause remanded, with directions to award a new trial, and for new proceedings consistent with this opinion.

Morehead & Reed and Shuck for appellant; *Harlan & Craddock* for appellee.

Breckinridge *vs* Coleman.

ERROR TO THE FAYETTE CIRCUIT.

ERROR CORAM VOBIS.

Case 91.

Writs of error coram vobis. Notice. Justices of the Peace. Limitation. Femes covert. Jurisdiction.

July 1.

JUDGE BRECK delivered the opinion of the Court.

Case stated.

IN 1843, Breckinridge recovered a judgment upon an account, before a Justice of the Peace, for $48 and costs, against Eliza B. Coleman, then the wife of James Coleman. An execution having issued thereon, the debt was replevied, with Samuel Coleman as security. A bill in chancery was subsequently filed by Mrs. Coleman and her husband and the surety in the replevin bond, and an injunction obtained restraining the collection of the judgment. It was alledged in the bill, that the account upon

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Breckinridge v. Coleman.

which the judgment was rendered, was fabricated and unjust, and that the complainant, Eliza, was at the rendition thereof, a *feme covert*.

On final hearing, the bill was dismissed and the injunction dissolved.

A further execution having issued upon the replevin bond, Mrs. Coleman sued out a writ of error *coram vobis*, averring the death of her husband subsequent to the emanation of the last execution, that she was a *feme covert* when the judgment was rendered and the debt replevied, and praying that the judgment might be set aside and the bond and execution quashed. The writ was issued and made returnable before the magistrate who rendered the judgment. The magistrate having refused to grant the relief sought, an appeal was taken to the Circuit Court, and the matters of law and fact being submitted to the Judge, the judgment was vacated and the replevin bond and execution quashed, and Breckinridge has brought the case to this Court.

Facts in the case.

In regard to the material facts in the case, there is no controversy. The *coverture* was admitted—the subsequent death of the husband, and that Mrs. Coleman had a separate estate.

Various objections, however, are raised, involving the legality and regularity of the proceedings upon the writ of error *coram vobis*.

And 1. It is objected that the writ should have been dismissed for the failure to give Breckinridge ten days' notice of the time and place of making application for it, as required by the act of 1803, (2 *Stat. Law*, 1555.)

The statute of 1803, (2 *St. Law*, 1555,) requiring notice of application for writs of error *coram vobis*, does not apply to a case where the object of the writ is to contest the validity of the judgment, nor is it necessary in such case to produce a copy of the bond and execution.

That act refers exclusively to proceedings for relief by writ of error *coram vobis*, against "faulty replevin and forthcoming bonds, or any faulty or erroneous execution," and was not intended, and does not embrace a case of the character now before us. In this case neither the bond nor the execution were, *per se*, *faulty* or defective. So far as appears, they were both regular. The allegation was, that there was no valid judgment to sustain them. For the same reason the objection that a copy of the bond and execution was not produced, as required by the act referred to, is not deemed available.

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2. It is objected that one Justice of the Peace was not authorized to issue such a writ.

The act of 1820, (2 *Stat. Law*, 814,) authorizes two Justices of the Peace, who have been designated by the County Court for that purpose, to grant, under particular circumstances, certain writs, and among them writs of error *coram vobis*. The authority thus conferred, however, does not take away or impair any power which Justices of the Peace may have previously possessed, to grant writs of error *coram vobis*, to correct errors in proceedings in their own Courts. The authority of a Justice of the Peace for that purpose, wherever it would be the appropriate remedy to issue such a writ, independent of any statutory provision, we apprehend is unquestionable. The writ is authorized by the common law and demandable as matter of right, and is applicable as a remedy to a magistrate's Court, as well as to the Circuit Court: *Case* vs *Ribelin*, (1 *J. J. Marshall*, 29, *and authorities there cited.*) It was in this case the appropriate remedy, and probably the only appropriate remedy.

Justices of the Peace in Kentucky, in virtue of their common jurisdiction, have power to award writs of error *coram vobis* whenever that is the appropriate remedy to correct errors in their own courts independently of the statute conferring the jurisdiction to grant such writs, on certain justices, to be designated by the County Courts. (1 *J. J. Marshall*, 29.)

3. It is urged that the limitation prescribed in the 4th and 5th sections of the act of 1802, (2 *Stat. Law*, 1554,) applies to this case. Those sections have reference, as decided by this Court in *Handley* vs *Fitzhugh*, (3 *Marshall*, 563,) to writs of error prosecuted for some error in a forthcoming or replevin bond, or in the Sheriff or other officer in taking the same. In that case an execution had been sued out against the administrator upon a judgment against his intestate, without revivor. In this case the execution issued upon a judgment, which the extraneous facts of coverture rendered invalid. The case, we think, is not embraced by the act referred to.

The statute of 1802, limiting the time for presenting writs of error *coram vobis* to correct errors in replevin or forthcoming bonds, does not apply to writs of error to correct an invalid judgment. (3 *Marsh.* 563.)

4. It is contended that as Mrs. Coleman, when the bill in chancery was filed and the injunction obtained, executed a release of all errors in the judgment at law, she is precluded from relying upon any errors in the judgment upon this proceeding.

The release was signed by Mrs. Coleman alone. Had she any authority, or was she competent to execute it? We think not. Notwithstanding she had separate estate there can be no doubt it could not be reached by any pro-

The execution of a release of errors on a judgment at law by a *feme covert* is invalied, though the husband be a party to the bill.

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ceeding at law. Even a confession of judgment would not be binding and enforcible against her as such. She is protected in the enjoyment of her separate estate through the aid of the Chancellor, and hence the Chancellor alone has the power to subject her estate to the payment of just and conscientious demands against her.

The separate estate of *femes covert* cannot be reached by a proceeding at law. *Argu.*

The doctrine seems to be, as contended, that the wife by her note or bond, may create a lien upon her estate, which a Court of Equity will enfore, but it is said there is no case in which a personal decree has been made against a *feme covert.* (1 *Maddock's Ch.* 474.) But we are aware of no authority in support of a proceeding at law against the wife alone to reach her separate estate for her contracts or liabilities. If Mrs. Coleman, by releasing the errors in this judgment, could render it valid and enforcible against her, we perceive no reason why she could not confess a judgment at law, and in that way place it out of her power to revoke or avoid it, which, in our opinion, would not be the case. The fact that the judgment was only prejudicial to her because it would subject her separate estate, and that her husband was a complainant in the bill, will not vary the case. For, whether the release may be presumed to have been executed by her with or without his assent and approbation, is not important. The release, we think, could not affect her right to set aside the judgment.

That a party failed to obtain relief before the Chancellor, who had no jurisdiction of the subject, presents no bar to relief on a writ of error *coram vobis*, the latter being the proper remedy.

5. It is contended that the Circuit Court, in the chancery suit, could properly have granted relief, upon the ground of *coverture*, by perpetuating the injunction against the judgment at law. This objection is also, in our opinion, untenable. As already stated, the appropriate, and only appropriate remedy for the error in rendering judgment against Mrs. Coleman, while a *feme covert*, was by writ of error *coram vobis.* The Circuit Court had no jurisdiction upon that ground, to correct the error and set aside the judgment, and consequently the proceeding in chancery, had it been formally relied on, would have constituted no bar to the writ of error *coram vobis.*

6. It is urged that upon the hearing of the writ of error, the justice rendered an additional judgment against Mrs. Coleman, or re-rendered the first judgment, and as she

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was then discovert, it was valid. The record of the proceeding before the justice, is indefinite and obscure, as to what the judgment was upon the writ of error. The only sensible construction we can give to it is, that he refused to vacate the first judgment. The only disposition which he seems to have made of the writ of error, is to render judgment against Mrs. Coleman for the same amount of the first judgment, with additional costs, we suppose the defendant's costs upon the writ of error. We think this amounts to a mere reiteration of his opinion, upon the trial of the warrant, consequent upon his refusal to give the relief sought by the writ of error. We cannot regard it as contended by counsel, as equivalent to a revocation of the former judgment, and a quashal of the replevin bond and execution, and a retrial of the cause upon the warrant against Mrs. Coleman as a *feme sole*, and the rendition of a new judgment against her as such.

But if possible to come to this conclusion, it would follow that taking the whole action of the justice, his disposition of the case was manifestly erroneous. The only issue upon the writ of error, was whether Mrs. Coleman at the rendition of the first judgment, was or not a *feme covert*. And upon that issue, to go on and try the warrant over again against her as a *feme sole*, would be unauthorized and absurd. The whole proceeding against her upon the warrant was erroneous.

Upon the trial of a writ of error *coram vobis* before a justice, upon the question of the validity of the judgment, the justice should only try and decide the matter in controversy, and not forthwith proceed to re-try the case as an original case.

The last objection relied upon is, that the appeal from the justice was to the March term of the Circuit Court, and not having been tried at that term, under the 5th section of the act of 1802, supra, it stood *ipso facto* dismissed. The section referred to, as before shown, does not apply to this case; but even if it did, it clearly has no reference to the trial upon the appeal. It applies to the trial of the case in the Court to which the writ was made returnable, and not to any other tribunal to which it may be transferred by appeal or otherwise.

The statute requiring writs of error *coram vobis* to be tried at the first term, does not apply to such trials before justices of the peace, nor to trials of an appeal from the decision of justices upon such writs.

Upon the whole, although the proceedings have been somewhat irregular, yet we perceive no available error for the reversal of the judgment. And, it is therefore affirmed.

Pindell for plaintiff; *Robertson and McKee* for def't.

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CHANCERY. **Tilford, &c. *vs* James' Adm'r., &c.**

Case 92. ERROR TO THE FAYETTE CIRCUIT.

Mortgages. Substitution. Accommodation indorsers. Diligence.

July 2. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

A mortgage to secure one in his securityships for the mortgagor, may embrace suretyship existing as accommodation indorser, and its efficacy depend upon contingency of the exercise of due diligence by the creditor, in persuing the principal, &c.

THE mortgage to Sayre not being conditioned to pay the debts in which he was surety for the mortgagor, but only to save him harmless, and indemnify him from all loss in his said suretyship, we are of opinion that the mortgage is not to be understood as an absolute security for all the debts referred to, but only for such as from the nature of Sayre's original agreement he was absolutely bound to pay if James did not. As this is the condition of a surety properly so called, it might be implied from the term surety used in the recitals and suretyship in the condition of the mortgage, that the engagement of Sayre, referred to in the recitals, and in the description of the notes in which he is said to be surety, were those of an ordinary surety, and that he was bound in all of them as a co-obligor, as a surety is ordinarily bound. But as an accommodation endorser is often called a surety, and has substantially the same rights, though not under the same obligations as an ordinary surety, we are of opinion that the recitals in the mortgage do not necessarily fix the nature of Sayre's obligation for the debts, or on the notes referred to. And that when upon the production of one of the notes, he appears not to be a co-obligor, but merely an endorser, the word surety is to be understood as indicating in that case, his character as accommodation endorser, and the word suretyship as referring to his engagement and liability in that character. The condition of the mortgage then, in such a case, is to save him harmless in his engagement and liability as accommodation endorser. But that engagement and liability are not absolute to pay the note, but are contingent, and depend upon the use of due diligence by the holder against the

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maker. And his liability to loss on account of such engagement being, therefore, also contingent, and the mortgage being only to save him from loss, there is no more room for the application or enforcement of the indemnity, when the liability to loss is discharged or removed by the failure of the creditor to use due diligence against the principal debtor, than when the same effect is produced by the debtor's paying the debt.

If a mortgage be made to a surety who is only an accommodation indorser, and the mortgagor be legally proved insolvent, or the surety becomes liable by use of proper diligence on the part of the creditor, the creditor then has a right to be substituted to the place of mortgagee, and ask a foreclosure for his benefit.

If the mortgagee's liability were absolute in the first instance, as in case of an ordinary surety, or if being at first contingent, as is that of an accommodation endorser, it becomes fixed by due diligence, then in either case the application of the mortgage fund to the payment of the particular debt, is apparently for the benefit of the mortgagee, and in effectuation of the purpose and intent of the mortgage. In case of the mortgagor's insolvency, this is obvious; and the equity of the creditor to enforce a disposition of the fund alike beneficial to himself and the mortgagee, is unquestionable. He is, therefore, substituted so far as his debt is concerned, to the rights of the mortgagee. Whether the creditors of a mortgagor have such an interest in a mortgage taken by a surety, the co-obligor of their debtor, conditioned not for the payment of the debts, but merely for his own indemnity, as that one of them who by reason of a secret arrangement with the principal for indulgence, enables the surety to discharge himself from that debt without payment, may, notwithstanding such release of the surety, claim the application of the fund to his debt, as one secured by the mortgage, need not be decided. We are satisfied that where, in one of the debts referred to, the original liability of the party taking such a mortgage, is contingent only as that of an endorser, he has no right himself to insist upon the application of the mortgage fund to that debt until his liability is fixed; certainly none when he is discharged from liability without loss, and the creditor who, by his negligence in pursuing the debtor, frees the surety from all liability and danger of loss, has no more right to stand as mortgagee for his debt, than if he had released his demand. The discharge of the endorser in such a case by negligence, is a discharge and satisfaction of the

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Tilford, adm. &c. vs. James' Ad'm. &c.

mortgage, so far as that debt is concerned, because it takes away the contingency on which alone, according to its terms and intent, it could be enforced.

Where the liability of a surety taking a mortgage is contingent, as is that of an accommodation indorser, the mortgagee has no right to insist on the application of the mortgaged effects until his liability is fixed; before it is fixed, mortgagee may release the mortgage. If the surety is released by the laches of the creditor, the latter cannot ask substitution to the rights of the mortgagee.

The note for which a claim is now made upon the mortgage fund is referred to in the mortgage, as one on, or in which Sayre is surety for the mortgagor to Samuel Asberry. But on production of the note it appears to be signed by the mortgagor alone, and payable to Asberry, whose name is on it as assignor to Sayre, whose name is on it as second assignor, with an assignment over it, and the note is set up by Tilford, a subsequent assignee, suing for the benefit of Asberry. Assuming that Asberry was an actual creditor, taking the note for the security of his debt, and that Sayre became a party to it at the request, and for the accommodation of the maker, the arrangement of the names as above stated, would seem to be rather unusual, and especially as Sayre stands merely as the assignee of Asberry, and the assignor, in his turn, of another. But while the recitals of the mortgage preclude the idea of any liability of Asberry to Sayre, the arrangement of the names on the note and the relation of assignor and assignee preclude any liability of Sayre to Asberry. Sayre then was only liable to subsequent assignees deriving title to the note from him. He was liable as assignor, that is, on condition of due diligence against the maker; and the mortgage secures him against loss on account of this contingent liability. That liability was subject to be extinguished without loss, by the failure to use the requisite diligence against the maker, and by its extinguishment in that mode, the mortgage itself, as an indemnity against this liability, was also extinguished. The holder of the note who could have no interest in the mortgage, except in virtue and to the extent of Sayre's liability, and in fact through Sayre, cannot possibly acquire the right of resorting to it for his own benefit, by or in consequence of the fact that his negligence has discharged the liability of Sayre, which constituted its only consideration.

It is admitted that there was not such diligence in pursuing the legal remedy upon the note, as to authorize a recovery at law against Sayre, but it is contended that as

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the maker was, in fact, insolvent, and had conveyed all his property by this mortgage, and as moreover this property being mortgaged to secure this debt, could not have been reached by execution for the same debt against the mortgagor, there was, in fact, no effectual legal remedy, and a resort to the Court of equity being necessary, the action at law might be dispensed with, and relief granted in this suit. But whatever might have been said if this suit had been brought at a time when the action at law upon the note should have been brought, and when by proper diligence at law, Sayre's liability as assignor might have been fixed, (as to which we intimate no opinion,) we are satisfied that after Sayre had been completely discharged from liability at law, by the laches of the holder of the note, it was too late to claim relief in equity on this ground. The very failure to sue at law, (or in equity,) in due time, freed the mortgaged property from its subjection to this debt under the mortgage, and left the equity of redemption open to a levy for its satisfaction; and although a mortgage which has been apparently extinguished, so far as its direct objects are concerned, will be sometimes kept alive or regarded as still subsisting for the benefit of a party who has in equity acquired the rights of the mortgagee, and ought to stand in his place, we do not regard the laches of the holder of the note, whereby the mortgagee, as his assignor, is discharged, and the mortgage for his indemnity extinguished, as presenting a case for the application of this doctrine, and especially when other creditors may be thereby injured. We do not suppose that the fact that the claim on the note is now set up in behalf of Asberry, who had no direct recourse upon Sayre, constitutes any obstacle to the relief sought for his benefit. If the subsequent assignee had a right to hold Sayre liable, he might have reached the mortgage fund through Sayre, and Asberry, by payment of the debt to him, might be substituted to his rights. But when the bill was filed the subsequent assignee had lost his recourse upon Sayre, and consequently, had no interest in the mortgage which could be asserted either for his own benefit or for that of Asberry.

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McGuire *et al.* vs Justices Owsley County.

The claim of Cochran stands upon even weaker grounds, since the note, although referred to in the mortgage as one in which Sayre was surety, was in the same form with respect to the attitude of the parties, as that to Asberry, and on that ground was, in fact, rejected by the creditor, and was not afterwards in his possession. There was, of course, no attempt to enforce it against the maker, and it is not produced in this suit. It had been signed and endorsed when the mortgage was made, but its rejection was not then known.

Wherefore, the decree rejecting these debts as privileged claims upon the mortgage fund, is affirmed.

Combs & Shy for plaintiffs; *Robinson & Johnson* for defendants.

Motion. **McGuire *et al.* *vs* the Justices of Owsley County.**

Case 93. Appeal from the Owsley County Court.

Collectors of County Levies. Motions. Evidence.

July 2. Judge Simpson delivered the opinion of the Court.

Case stated. This is an appeal from a judgment of the Owsley County Court, rendered against the appellants, as the securities of the Sheriff of Owsley, on his bond as collector.

It is contended on behalf of the appellants, that the bond should have been executed to the Justices of the County Court, under the act of 1797, (2 *Stat. Law*, 1115,) and that having been executed to the Commonwealth of Kentucky, it is unauthorized and void.

Since the statute of 1810, (2 *Stat. Law*, 1250,) the bonds of collectors of county levies are properly made payable to the Commonwealth, (5 *Ben. Monroe*, 196.)

It was decided by this Court, in the case of the *Justices of Grant County* vs *Bartlett, &c.*, (5 *B. Monroe*, 196,) that a bond executed to the Commonwealth by a collector, is a good and valid bond, under the act of 1810, (2 *Stat. Law*, 1250,) which requires bonds of a certain description to be executed to the Commonwealth. It is argued, however, that the Court was mistaken in relation to the provisions of the statute, and that they only apply

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to that class of cases in which the bonds had been previously made payable to the Governor. It is true that the language of the first section of that act is, "that all bonds of a kind heretofore made payable to the Commonwealth or to the Governor, shall hereafter be made payable to the Commonwealth of Kentucky," and if no other bonds were embraced by any of its provisions but those already enumerated, it might well be doubted whether it would apply to the bond of a collector. But the 8th section of the act declares "that the bonds of guardians, of executors, and of administrators, and *others*, who by law are required to execute a bond to the County Court Justices, shall be made payable to the Commonwealth of Kentucky, instead of the Justices." So that it is evident it embraces in its provisions all those bonds which before its passage were made payable to the Justices of the County Court.

It is contended, however, that if the bond in this case is properly executed to the Commonwealth, that then the motion is improperly made in the name of the Justices of the County Court.

The act of 1797, which has been already referred to, authorizes the proceeding to be carried on in their names, and the act of 1793, (1 *Stat. Law*, 503,) gives the same authority, as was decided in the case of *Carter, &c.* vs *Justices Carter County Court*, (3 *B. Monroe*, 334.) The act of 1810, which authorizes a suit to be brought in the name of the Commonwealth, does not conflict with, and therefore does not repeal the provisions of the statutes of 1793 and 1797, on this subject. The right to make a motion in the County Court, under the last mentioned statutes, still exists, though the right to sue upon the bond is also given by the act of 1810.

Motions upon the bonds of collectors of county levies, is properly made in the name of the justices of the County Court, (1 *Stat. Law*, 503; 2 *Ibid*, 1115,) and the statute of 1810, authorizing a suit on the bond does not take away the remedy by motion.

It is objected to the order made upon the trial, that it does not show there was a full Court when the levy was laid, and therefore it does not appear that the levies placed in the hands of the collector were legal, and such as he had power to collect, and consequently his securities are not liable in this motion.

It is necessary, under the law, that a majority of all the Justices in commission shall be present, when a County

Nothing appearing to the contrary, this Court

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McGuire *et al.* vs Justices Owsley County.

will presume that a County Court was composed of a majority of the Justices of the county when a levy was laid.

Court proceeds to lay the levy, and make appropriations; and a levy made by less than a majority, is unauthorized and void. But the County Court having general jurisdiction on this subject, and the order exhibited not showing how, or in what manner the Court was constituted, the presumption must be indulged in support of its action, that it was competent at the time, to make the order, being composed of as many members as were necessary to legalize its proceedings. The order itself not proving any thing upon this point, a presumption must exist, either that a Court not organized as the law requires, proceeded to act illegally and without authority, or that knowing the extent of its jurisdiction, and what was necessary to enable it to act legally on this subject, it was organized with a view to the exercise of this power at the time the order was made. The latter presumption is the only one that can be indulged, particularly when it does not appear that the authority of the collector was ever questioned on this ground, although he had received the levies for collection, and made a settlement with the County Court at the end of the year.

County Courts are authorized to lay a levy sufficiently large to cover claims against the county, such as may accrue on account of public buildings, &c., and to cover deficiencies arising from levies of preceding years.

Another question is raised, as to the legality of the levy. It is contended, that by an act of 1810, (2 *Stat. Law*, 1119,) the County Courts are prohibited from raising by a county levy, a larger sum than is necessary to pay the claims against the county, and leave a reasonable overplus for probable delinquents, and as the order in this case shows a much larger amount than these purposes required, the Court in making it, exceeded its authority. This objection is founded on a misconception of the statutes on this subject. The County Courts are authorized to lay a levy sufficient to cover claims against the county then due, and also to raise a fund sufficient to liquidate and discharge claims that may accrue on account of engagements for public buildings, or which have arisen from the deficiency of the levy of the preceding years to meet the claims of those years, and for many other purposes. And, notwithstanding the credit given the collector for county claims, is but a small portion of the levy in his hands, yet the other legal claims against the coun-

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ty, may require the application of the whole residue of the fund to their discharge.

There is nothing in the objection made to the time when the levies were placed in the hands of the collector. The law now requires the levies to be collected in the same year that the lists are taken, so that the lists have to be returned by the commissioners before any collection can be made, and the previous laws regulating this matter have at this time no application.

Settlements made with a county collector are competent evidence against his sureties, (3 *B. Mon.*, 195.)

The settlement made by the County Court with the collector, is competent evidence on a motion against the securities, as was decided in the case of the *Justices of Grant County* vs *Bartlett, et al.*, (5 *B. Monroe*, 195.) But the County Court is only authorized by law, to give judgment against the securities for the sum that may appear due from the collector. In this case, the data furnished by the settlement itself, proves that there is not as much due from the collector as the Court has rendered judgment for against the securities.

Collectors of levies are allowed by law 7 1-2 per cent. on the monies collected.

In the settlement the collector is allowed only six per cent. commission on the residue in his hands, after deducting the county claims paid by him, when the law allows him seven and one half per cent. commission on all that he may collect. This error is apparent on the face of the settlement, and although the judgment of the Court does not exceed the amount of the balance due as shown by the settlement, yet it exceeds the sum actually due, as the settlement itself proves, by the evidence which it contains. It was, therefore, erroneous for the Court to render judgment for a greater amount than was due, after deducting the allowance which the collector was entitled to for collecting.

For this error the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

B. Y. Owsley and Noland for appellants; *Barnes* for appellees.

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CHANCERY.

Case 94.

Milward, &c. *vs* Cochran, &c.

ERROR TO THE FAYETTE CIRCUIT.

Attachment in chancery. Lien. Execution lien. Lis pendens.

July 3. JUDGE BRECK delivered the opinion of the Court.

Case stated. COCHRAN & Co. filed their bill seeking to subject two slaves to the payment of a note which they held upon James W. Cryer:

1st. Upon the ground that after the slaves had been given to Cryer by his father in law, Spencer Cooper, and had vested in him absolutely as his property, he had, for the purpose of hindering and preventing his creditors from levying upon them, contrived a deed of loan, by which the title to the slaves had vested in said Cooper, but the possession had still remained with Cryer.

2d. They alledge that after the death of Cooper, the wife of Cryer had claimed the slaves as her separate property, and they were then in possession of Mary Cooper, who was holding them in trust for Mrs. Cryer; and in the event they should be decided to be her separate property, the complainants sought to subject them, upon the ground that the note, which they exhibited upon James W. Cryer, was given for necessaries furnished for the support of Mrs. Cryer and family.

Cryer and wife and Mary Cooper were made defendants, and subpœna served upon them, endorsed, that the object of the bill was to attach the two slaves therein named, and their hire, for the payment of the complainant's demand.

The complainants afterwards filed an amended bill, in which they alledge that the slaves had been decided to be the property of James W. Cryer. That the slaves had been both sold under executions which had a prior lien to that which attached upon the exhibition of their bill. That the proceeds of the one had been entirely absorbed by executions having such prior lien, and also a portion

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of the other. That a portion, however, of the proceeds of the slave Maria, had been paid over to the plaintiffs in error, Milward and Ennis, and to Robert King, J. & W. R. Chew for the use of R. Pindell and J. G. Morrison, or to Constables for their use. They alledge that Milward had received $41 50, Ennis $49 03, and also certain sums had been paid over to the other named individuals. They make them all defendants, alledge that their liens were acquired subsequent to the lien of complainant in virtue of their original bill, and pray that they may be decreed to pay over to them such sums as may be necessary for the payment of their claim. King having died, the suit abated as to him.

Decree of the Circuit Court.

Process as to Morrison, was returned, no inhabitant, and in regard to the Chews, Pindell answered, showing that what had been received by him upon executions in their name, had been paid over by him as assignee in bankruptcy, agreeably to a decree of the Fayette Circuit Court. The Court decreed that Milward and Ennis pay over to the complainant the alledged sums in their hands, and that they also pay complainants their costs. The Court, however, continued the cause, with leave to Milward and Ennis to be substituted to any claims of complainant on Cryer, or to have contribution or indemnity from any others, to which they might be entitled.

To reverse that decree, Milward and Ennis prosecute this writ of error.

The first inquiry is, whether a lien attached upon the slaves in favor of the complainants, upon the filing of their bill.

The second section of the statute of 1838, (3 *St. Law*, 116,) appicable to this case.

The jurisdiction of a Court of Equity to grant relief upon the first ground relied upon in the original bill, is given by the act of 1838, (3 *Stat. Law*, 116.) The 2d section of that act vests a Court of Chancery with power and jurisdiction, upon the application of a creditor, whether his debt be or be not in judgment, to set aside a sale or conveyance made for the purpose of hindering and delaying creditors in the collection of their debts, and to subject the property to the payment of the debt of the applicant. And in aid of the execution of this power, the Court is authorized to order an attachment, and to make

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MILWARD, &c. vs COCHRAN, &c.

all other necessary orders for the safety and forthcoming of the property.

In this case no attachment was sued out, but we are of opinion the power of the Court to subject the property did not depend upon the actual levy of an attachment. A lien upon the slaves attached, upon the exhibition of the complainant's bill and the service of process. The only object and effect of an attachment and levy, would have been to secure more effectually the slaves against removal, and have them forthcoming to abide the decree of the Court. The suit was a *lis pendens*, and no subsequent sale or after acquired lien would destroy or affect the prior lien and right of the complainants.

In a proceeding under the statute of 1838, (3 *Stat. Law*, 116,) the power of the Chancellor to subject property to the payment of the debts of the defendant, does not depend upon the actual levy of an attachment, a lien attaches on the property sought to be made subject, on filing the bill and service of process.

The bill of the complainants, it is true, was framed with a double aspect: First, to subject the slaves under the statute, and secondly, if proved to be the separate property of Mrs. Cryer, to reach them upon the equitable principle that the consideration of the claim set up was necessaries furnished for the use of Mrs. Cryer and her family. The last ground thus contingently relied upon, did not, we think, affect the lien and right of the complainants to relief upon the first ground under the statute.

Assuming then that a lien in favor of the complainants, attached upon filing their bill, and it appearing that both slaves were sold under executions previously levied, and the entire proceeds of the one and part of the other, applied in discharge thereof, the question arises whether the Chancellor was right in following the residue of the proceeds into the hands of the defendants, and decreeing them to pay it over to the complainants in discharge of their claim. We think he was. It is expressly alledged in the amended bill, that the conveyance from Cryer to Cooper had been decided to be fraudulent, and that the slaves were subject to the payment of Cryer's debts. Such appears to have been the decision of this Court. The defendants, Milward and Ennis, in their answer, do not deny the allegation as to the amount of the proceeds of the slave Maria, received by them respectively, but they say they had executions against Cryer, and they received the money thereon from the Constables, and that they are ignorant of the matters and things set forth by

If the property sought to be subjected under the statute of 1838, by bill in chancery be previously levied upon by execution, the Chancellor may follow any surplus, after the execution is satisfied, into the hands of third persons, who may receive it after the *lis pendens* exists.

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the complainants. They refer to their judgments and executions, but do not exhibit them. All the material facts to entitle the complainants to a decree, appear in the record. It was not necessary for them to have brought the representatives of King before the Court, nor Morrison. There appears to have been no such connection between them and Milward and Ennis, as rendered them necessary parties to entitle the complainants to a decree for the funds in their hands. They in their answer pray to be substituted to all the rights the complainants may have to any other fund, and the Court very properly continued the cause, with leave to them by cross bill, to set up their right to substitution, or to contribution from any other party.

Wherefore, the decree is affirmed.

Pindell for plaintiff; *Robinson & Johnson* for def'ts.

Hays *vs* Blanks, &c.

CHANCERY.

ERROR TO THE LINCOLN CIRCUIT.

Case 95.

Femes covert. Maintainance. Creditors.

JUDGE BIBB delivered the opinion of the Court.

July 13.

HAYS exhibited this bill against Blanks and wife, seeking to subject to the satisfaction of a judgment against the former, his interest in right of his wife, in her father's estate. The Court below dismissed the bill and Hays has brought the case to this Court.

Case stated.

The bill alledges that Blanks was a non-resident; that he was an industrious, prudent man, possessed of a good estate, and that he provided well for his wife and children.

Blanks and wife filed separate answers, each resisting the relief sought. Mrs. Blanks prays the protection of the Chancellor, and that her share in her father's estate may be settled upon her and her children.

The habits and pecuniary situation of the husband are not controverted, but sustained by the testimony. The estate of the father of Mrs. Blanks was undivided and

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HAYS vs BLANKS.

still in the possession, or under the control of the executors. Mrs. Blanks is charged in the will with an advancement of about one thousand dollars. What further sum she will be entitled to does not very clearly appear, as no settlement had been made with the executors. It may, however, be inferred from what appears in the record, that it will not fall much short of two thousand dollars.

In this view of the case, the question arises whether the Court below was right in refusing to appropriate the patrimony of the wife or any portion thereof, to the satisfaction of the complainant's demand against the husband.

The equity of a *feme covert* to have a suitable maintainance secured to her out of her father's estate, does not depend upon the solvency or insolvency of the husband, nor upon the support she and her children may receive from the husband. The Chancellor regards the estate in equity as belonging to her, and her equity to a support to be secured to her and her children, is superior to that of the husband or the creditors of the husband who occupy no better condition than the husband.

The *equity* of the wife in a case of this kind does not rest, as contended, upon the insolvency of the husband, nor upon the ground tha the is improvident and fails suitably to provide for her support, and that of her children, although such circumstances would constitute an additional and powerful reason why the Chancellor should protect the interest of the wife. But it rests upon the broad ground that in a Court of equity it is regarded as her estate, which she has a right to have expressly set apart and secured, or such portion thereof as may be necessary for the permanent support of herself and children. Hence the doctrine is now well settled, that the Chancellor will not aid the husband, nor permit him nor his assignee nor creditor, to acquire possession of the funds or personal estate of the wife, until an adequate settlement is made upon her. In this case the husband and wife reside in the State of Missouri, and are not within the jurisdiction of the Court. But if they were, and the husband's estate was here, still the Chancellor would not attempt to provide for the wife out of his estate. He would only refuse to aid him in acquiring possession of her estate.

The creditor occupies no better attitude than the assignee, and neither no better attitude than the husband. As to the extent of the interest of Mrs. Blanks in this case, we are not satisfied that it exceeds a proper settlement for her. In some cases, the Chancellor directs the interest and profits of the wife's estate to be paid over to the husband when she is properly maintained by him, but

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in this case it appears that he has already received from her father a considerable sum, by way of advancement. Besides, her interest was not of a character to justify any appropriation upon that ground, in discharge of the complainant's demand.

In support of the foregoing principles, *Clancy on Rights*, 140 *to* 150; *Kenny* vs *Udall*, (5 *Johnson's Chy. Rep.* 464, *and authorities there cited, and numerous cases in this Court,*) are referred to.

The decree is, therefore, affirmed.

Kincaid for plaintiff; *Harlan & Craddock* for defendants.

Rogers, &c. *vs* Hall.

TRESPASS.

ERROR TO THE CLAY CIRCUIT.

Case 96.

Justices Courts. Pleading.

JUDGE SIMPSON delivered the opinion of the Court.

July 30.

THIS is an action of trespass, brought by Hall against the plaintiff in error, for a sorrel mare.

Case stated.

A plea was filed alledging a judgment against Hall before a Justice of the Peace, an execution on the judgment, a levy of the same by the proper officer on the property sued for, and a sale thereof, to satisfy the execution, which is avered to be the same trespass complained of in the plaintiff's declaration.

The persons sued, are the plaintiff in the execution and the magistrate who gave the judgment.

To this plea filed by the defendants, a replication was put in, stating that the judgment upon which the execution issued was entered up by the Justice out of term time, and in vacation, and therefore did not justify the act of taking and selling the plaintiff's property.

The defendants then rejoined, that the judgment was entered, and the execution issued thereon by the consent of the plaintiff.

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ROGERS, &c. vs. HALL.

To this rejoinder a demurrer was filed, and sustained. Whether the Court was right in sustaining this demurrer, is the only question that it is necessary to notice.

Justices of the Peace may hold Courts and adjudicate at other times than at their quarterly Courts, in the cases mentioned in the 4th and 12th sections, (*Ses. Acts.* 78.)

The act regulating the time of holding Justices' Courts, (*Session Acts*, 1842–3, 78,) although it provides that their Courts shall be held for the trial of civil suits, once in every three months, at such time in the months therein named, as the Justices may designate, yet it does not deprive them, in all cases, of the power to adjudicate in vacation, but expressly empowers them, in a class of cases mentioned in the fourth and twelfth sections of the act, to hold their Court, and try such cases without regard to the time prescribed for holding their terms.

It is declared in the twelfth section of the act, that when any plaintiff shall make oath, that he verily believes the defendant will remove his or her property out of this State, or otherwise dispose of the same so that execution cannot be made after judgment, unless the same shall be obtained before the ordinary trial day, it shall be lawful for the Justice to hear the case as soon as may be, according to the circumstances.

If a Justice does hear civil causes at other times than at his quarterly terms, it may be shown that he did so under a state of case warranted by the statute.

Inasmuch, therefore, as they may, upon a proper case having been made out, proceed to hear and determine civil cases out of term time, no reason is perceived why the defendant may not waive the formality of an affidavit by the plaintiff and consent to a trial forthwith. The regulation requiring Justices of the Peace to hold stated quarterly terms, is evidently intended for the benefit of the defendant. It is an advantage he may surrender if he choose. It is one that he cannot retain for the purpose of defeating the collection of the plaintiff's demand. If he consent to a trial before the regular time, an implication arises, that it was done to withhold the plaintiff from presenting a state of case that would entitle him to an immediate trial, and the consent should have the effect of authorizing the Justice to proceed, just as if such a state of case had been fully made out.

It results, therefore, that the rejoinder made by the defendants to the plaintiff's replication, was good and sufficient, and the Court erred in sustaining the demurrer to it.

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Wherefore, the judgment is reversed and cause remanded, with directions to overrule said demurrer, and for further proceedings consistent with this opinion.

B. & A. Monroe for plaintiff; *B. Y. Owsley* for defendant.

Alexander, &c. *vs* Slavens, &c.

CHANCERY.

APPEAL FROM THE MERCER CIRCUIT.

Case 97.

Trusts. Charities. Bills of review. Liens. Parties.

July 17.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

SEVERAL years since, sundry subscribers promised to pay to Joel P. Williams and four other individuals, the sums of money annexed to their names, for the purpose of purchasing a lot of ground in the town of Harrodsburg, and erecting thereon a suitable building for religious worship. They constituted and appointed Williams and the other four individuals to act as trustees, authorizing them to make such disposition of the amount subscribed, as would best tend to accomplish this object. The house when built was to be subject to the following regulations:

The Methodist Episcopal Church was to have the exclusive use and occupation of it, for public worship, two Sabbaths in every month, the days to be selected by that society, and published at the commencement of each year.

For the balance of the time, it was to be free for the use and occupation of every denomination of christians who worshipped God in an orderly and peaceable manner.

The trustees, under this authority, purchased a lot of ground in Harrodsburg, obtained the legal title thereto, and erected on it a brick house, which was used by the Methodist Church in that place, two Sabbaths in each month, and by other religious denominations, when they chose to do so, the balance of the time.

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ALEXANDER, &c. vs SLAVENS, &c.

The fund raised by the subscription above mentioned, was insufficient to meet the expenditure necessarily incurred in the erection of the building. And even after contributions had been made to a considerable extent by others, a lien in favor of John W. Cardwell, to secure the payment of what remained due for work done upon the building, still existed on the property.

The Methodist Church became desirous of having a house of worship of their own, to be regulated and controlled by themselves. To aid them in the accomplishment of this design, they concluded to make sale of their interest in this property.

To effect this object, they appointed John Slavens and two other persons to act as a committee, and the Baptist Church in Harrodsburg appointed William Robertson and two other persons, on their part, to act for them; the one committee with full authority to sell, and the other to purchase, all the interest, rights and privileges to which the Methodist Church were entitled in the house and ground aforesaid.

Accordingly, on the 5th of November, 1840, an agreement was entered into by said committee, by which the Methodist Church sold to the Baptist Church, at the price of fourteen hundred dollars, all their interest in said property; the parties stipulating, on the one side for the payment of the price in instalments, and on the other, for a conveyance of the interest sold, by deed of general warranty.

The first decree of the Circuit Court.

Part of the purchase money having been paid, a bill in chancery was filed in the names of the individuals composing the committee on the part of the Baptist Church, in which the persons who acted as committee in making the sale for the Methodist Church, were alone made parties. An inability to make title, growing out of the nature of the property sold, was alledged, and a rescission of the contract asked on that ground. No answer having been filed, the bill was taken for confessed, and a decree rendered rescinding the contract, and ordering the defendants to repay the purchase money that had been paid to them.

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This bill was then filed, being a bill in the nature of a bill of review, in the names of the committee of the Methodist Church, and also of the trustees who held the title to the property, insisting on a specific execution of the contract, and making the complainants in the former suit, as well as the trustees of the Baptist Church, defendants. They alledge that the persons made defendants in the first suit, conceiving that they had no interest, personally, in the controversy, neglected to answer. That the trustees were making preparations to answer, but the cause was heard, and the bill taken for confessed unexpectedly, and irregularly, the proper parties not having been brought before the Court. On hearing, the Circuit Court decreed a specific execution of the contract, and a perpetual injunction of the previous decree. The defendants appealed from this decree, and have brought it to this Court for revision. The opposition to the decree, as well as to the compliance with the contract of purchase, seems to grow out of an honest conviction entertained by the Baptist Church, of a legal inability on the part of the Methodist Church, to invest the purchasers with the interest, rights and privileges to which they were entitled in the property.

The object of this bill.

Can the Methodist Church transfer this interest, or is it a privilege so peculiarly denominational as to render it inalienable? The general principle is, that every interest in real property, be it of what nature or description it may, is the subject of alienation. The policy of the law of this country, is opposed to fettering estates. It favors the sale and transfer of them from hand to hand, and discourages all attempts to tie them up, and clog them with limitations or restrictions which tend to impair or destroy in them this quality.

The law of alienation of estates.

The title to this lot of ground having been vested in trustees, to hold for certain purposes, their deed to the trustees of the Baptist Church certainly conveys the legal title. The Baptist Church, under the title so conveyed, are secure against any proceedings in the common law Courts to disturb their possession, or to deprive them of the use thus acquired.

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ALEXANDER, &c. vs SLAVENS, &c.

Are they equally secured against the interposition of the Chancellor, or can any of the parties interested under the deed, object to the substitution of the Baptist Church to the rights and privileges that belonged under the deed, to the Methodist Church?

A subscription was raised to build a house of public worship in Harrodsburg, and the fund committed to the management of certain trustees, purchase ground and build a house to be used by the Methodist Episcopal Church half the sabbaths in the month, the remaining Sabbaths by other denominations; the same trustees were authorized to sell the house after a title was acquired, to another denomination, & vest the fund in another house for the Methodist E. Church exclusively, and which was done. Held that the original subscribers could not complain, and that the trust was well performed, and the contract of sale executed.

The solution of this question necessarily leads to an examination of the original object and design of the contributors, by whose charitable donations the lot was purchased, and the house of public worship erected. The main object contemplated by them, undoubtedly was, to secure a place of worship for a Methodist congregation in the town of Harrodsburg, securing at the same time, but subservient to the main design, a right to other religious societies to use the house, when not occupied by the Methodist. If the sale in question had been made to defeat, or had even a tendency to defeat this original design, it might be regarded as a breach of trust, and unauthorized. But, if on the contrary, it promotes this design, if the object contemplated by the original founders of this charitable trust is more effectually advanced, by means of this sale, and through its instrumentality, than it would otherwise be, they have no cause to complain of it. The money arising from the sale of this property, has been, so far as it has been collected, and the remainder of it is to be, appropriated to the erection of a large and commodious house in the town of Harrodsburg, dedicated to the worship of God, and belonging exclusively to the Methodist. The contributors to this fund, so far as they desired to advance the Methodist cause, or to promote the convenience of the members of the Methodist Church in the town of Harrodsburg, must be presumed to favor a project which aids so essentially in effectuating their design. And as they evidently desired to promote the cause of religion, and to encourage other religious denominations to use the house for the purpose of public worship, this part of their design is also advanced by this arrangement. The house being no longer used by the Methodist, it can be occupied wholly by others. Every object that the donors contemplated, or desired to accomplish, will be attained, and so far as they are concerned, this disposition cannot be considered

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otherwise than as entirely consistent with a provident administration of the fund for the benefit and promotion of the original design entertained by them.

Neither the members of the present Methodist congregation, or the succeeding members of that Church in the town of Harrodsburg, even could they be supposed capable of making the effort, would be permitted by the Chancellor, in violation of good faith, and a solemn contract on their part, to assert any claim to the property. The privileges of other religious denominations are enlarged and extended by the arrangement, and they could not complain of that which operates to their advantage instead of their injury.

It thus appears that no available objection to this disposition of the property, can be presented from any quarter. By it the Baptist Church are invested with all the rights and privileges held by the Methodist Church. There is no impediment to their enjoyment, growing out of the qualification annexed to the occupancy, requiring an annual notice to be given of the Sabbaths selected for their exclusive use. The property will be held by them subject to the same restrictions and limitations it was under, in the hands of their vendors. They, however, can hereafter act in their own name, and it will be as effectual as was the action of the Methodist Episcopal Church in its name, during the time it was the owner of the property.

The want of proper parties is good ground for filing a bill of review. (*Mitford's Pleading*, 92)

Does the first decree between some of these parties preclude the Court from the specific enforcement of this contract? It cannot have this effect. The contract itself shows that the individuals in whose name it was made, were not acting for themselves. They acted as committees, representing their respective Churches. They were in fact mere agents, the Churches for whom they acted, were the principals. The trustees then, holding the property for the Methodist Church were clearly necessary parties to the bill filed for a rescission of the contract. The want of proper parties is a sufficient cause for a bill of review, where, as in this instance it appears from the record, that persons substantially interested in the result were not made parties. This authorized the

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ALEXANDER, &c. vs SLAVENS, &c.

Court to open the decree. Having done so, it was just and equitable to decree a specific execution of the contract.

If a decree is made against persons having no interest at all in the matter in dispute, or not such an interest as was sufficient to render the decree against them binding upon some person claiming the same or a similar interest, relief may be obtained against error in the decree, by a bill in the nature of a bill of review. (*Mitford's pleadings*, 92, *and the cases put by way of illustration.*)

No person is bound by a decree affecting his interest to which he was not a party.

This principle establishes the propriety of the individuals who made the contract, and those who acted as trustees, and held the legal title to the property, joining as complainants in the bill filed to obtain relief against this decree, and to enforce a compliance with the terms of the contract. It also manifests the propriety of making the individuals who acted as a committee on behalf of the Baptist Church in making the contract, as well as those who were acting in the capacity of trustees for that Church, defendants to the bill. The trustees being the persons who were the proper representatives of the interests of the Church, had a right to apply to a Court of Equity for a specific execution of the agreement. If the previous decree could be regarded as forming an obstacle to the relief they sought, they were justified by their position to assail it. Not being parties, however, they were not bound by it, and if no error had appeared in the record, still they could have maintained an original bill for the same purpose for which this has been prosecuted, not being affected in any degree by a proceeding to which they were not parties, and to which no persons authorized to represent them had been made parties.

One holding a lien upon property, who unites in a conveyance thereof to a third person, thereby waives his lien.

John W. Cardwell having joined in the deed to the trustees of the Baptist Church, and having expressly transfered and released all the interest which he had in the property individually, his lien on it no longer exists, and cannot be hereafter asserted to the prejudice of his vendees.

We have not deemed it necessary to notice the act of the Legislature of this State, authorizing the sale and conveyance of this property. We have considered it as

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vendible, from its nature and character, and the disposition made of it, as entirely consistent with the views and object entertained by the original contributors.

Neither have we called to our aid, the extraordinary powers sometimes assumed by Courts of Equity, in disposing of charities by which the trust is executed, even where express directions have been given by the founder of the charity, in a mode not at all consistent with, or pursuant to his directions. Nor do we consider it necessary to intimate at this time, what the decision of this Court would be in a case of that kind. In this case, the sale is for the benefit of the charity. It promotes the design of the founders. It is not inconsistent with their views, either expressed or implied, in relation to its destined application, and consequently no legal or equitable objection to it exists.

Wherefore, the decree of the Circuit Court must be affirmed.

Harlan & Craddock for appellants; *Robertson & McKee* for appellees.

Brown *vs* Foree, &c.

TRESPASS.

APPEAL FROM THE SHELBY CIRCUIT.

Case 98.

Fraud. Vendor. Vendee. Fraudulent sales.

The present Chief Justice delivered this opinion on the 31st October, 1846, a few days before the end of the term, it was suspended until the — July, 1847, when the suspension was removed.

THIS action of trespass was brought by Brown to recover damages, for taking under several attachments against D. R. Johnston, divers articles of personal property which Johnston had sold and conveyed to him together with his farm, crop, stock, &c. &c.

Case stated.

The first and third instructions assert, in effect, that if a purchaser of property from an indebted vendor, knows at the time of his purchase, that the vendor makes the sale with the intent of thereby hindering or delaying any of his creditors from making their debts by execution, or of delaying them in the regular course of collecting their

The fact that a vendee of property has a *knowledge* that the vendor, by the sale of the property, intends to hinder, delay or defraud all or any of his credi-

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BROWN
vs
FORBE, &c.

tors, is not conclusive that the vendee had *an intent* to aid the vendor in defrauding his creditors, and render the sale fraudulent and void.

debts by law, such knowledge furnishes conclusive evidence of fraud in the vendee, and makes his purchase void, although he may actually pay a full consideration for the property. But the debtor himself, though he resorts to a sale for the purpose of hindering and delaying some of his creditors, may intend it as a means of paying others; and if this be so, or if the vendee has reasonable grounds for supposing it to be so, the mere knowledge that the vendor intends to hinder and delay some of his creditors, cannot establish, or at least cannot conclusively prove as against him any fraudulent intent. If a sale is made with the fraudulent intent on the part of the debtor of thereby placing both his property and its price out of the reach of his creditors, and of thus defeating them in the collection of their debts, it would be difficult to avoid the conclusion, that if the purchaser, being under no necessity to purchase, knew of this fraudulent intent, and made the purchase without taking any means to prevent its effectuation, he must be regarded as having participated in it.

—But when the vendee actually pays out a full and fair price for his purchase, a considerable portion of which goes to discharge the vendor's debts for which vendee is surety, these facts furnish strong evidence for the conclusion that the *intent* of the vendee was his own security, rather than to defraud the creditors of the vendor. These facts should be left to the jury to aid them in determining the *intent* of the vendee in the purchase.

But on the other hand, the fact, if absolutely certain, that the purchaser actually pays out of his own means, and irrevocably, a full consideration for the property, and especially when he secures a considerable portion of it to the payment of the vendor's debts, in some of which he is himself bound as surety, furnishes also a strong ground for viewing in a favorable light his participation in the transaction; and although it may not of itself absolutely repel the inference of fraud, arising from his knowledge of the vendor's intent, it has a tendency to repel it, and should, with other circumstances, be left to the jury which is to determine the question of fraud. At any rate, the certainty of a fact which so strongly indicates good faith on the part of the purchaser, should require satisfactory proof of the opposing fact of knowledge of the fraud, before this last fact should be taken to establish his concurrence in the fraudulent intent. And if it can be fairly assumed, upon all the circumstances, that instead of expecting and intending that the price paid by him will be withheld from creditors, he expected it to be paid to them, and did not make the purchase in order to defeat

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them, he should not be implicated in the fraud on the ground that he may perhaps have known of the vendor's intent, and made the purchase without sufficiently guarding against it. Men too often neglect the precautions necessary for the protection of their own immediate interests, to allow of the establishment of a principle which, in so common a transaction as that of a sale of property, would make the failure of the purchaser to impose positive and effectual guards against the possible or even probable misapplication of the price which he is paying, conclusive evidence of his concurrence in the apprehended injury to third persons. It would be too great a restriction upon the common business and traffick of men, if every or any purchase from a debtor is to be conclusively invalidated whenever, and because a jury may afterwards, upon such view of the subject as may be presented to them, and upon comparison of probabilities, be authorized to infer that the purchaser probably knew or ought to have known that the vendor intended to defraud his creditors. These observations apply with increased force, when there is a doubt also as to the fraudulent intent of the vendor himself.

The true question in such cases is, with what motive and for what purpose did the parties make the transaction? Did the vendor make the sale with intent to defraud his creditors and as a means of doing so? Did the vendee make the purchase with intent to defraud the creditors of the vendor and as a means of aiding in the accomplishment of his purpose? We do not deny, but admit that when the fraudulent intent of the vendor and the vendee's knowledge of that intent are established, these facts, if unopposed, will authorize the conclusion that in making the purchase without protecting the interests of the creditors, the vendee gives such evidence of his concurrence in the fraudulent intent and injurious effect of the sale, as is sufficient to establish the fraud even as against him. But the question is as to his own actual intent. It is a question of fact, and is the main fact in the issue. And although it may be inferred from the other facts just stated, yet as there may be, and indeed always are other, and in different cases varying facts bearing

The *intent* to defraud, by a sale of property, the creditors of the vendor and vendee, must exist with the vendee as well as with the vendor, and the sale be the means of carrying that fraudulent intent into effect. The fact of the knowledge on the part of the vendee of the vendor's *intent*, is not always conclusive evidence of the participation of the vendee in that *intent*.

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BROWN vs FORBE, &c.

upon the question of intent, it is inconsistent with the principles which should regulate the investigation of mere facts and the free inquiry after truth, to make one single fact, viz: the vendee's knowledge of the vendor's fraudulent intent, conclusive evidence of a similar intent on his part. This would be to change the issue, to stop in the inquiry before its real end is attained—to make a probable conclusion as to a preliminary fact absolutely decisive of the main fact in question. We think the two instructions were erroneous in requiring the jury to base a verdict against the validity of the sale, upon their belief of the single fact of the vendee's knowledge that the vendor made the sale with the intent to hinder, delay or defraud any of his creditors, or all of them, if the instructions refer to all. The policy of the law has made one fact, viz: the vendor's continuance in possession in opposition to the terms and nature of an absolute sale, conclusive evidence of fraud in both parties. But the fact of the vendee's knowledge of the vendor's fraudulent intent, does not come within the same principle or policy. And regarding it only as a fact tending more or less strongly to prove a fraudulent intent in the vendee, it should be left to the jury with other facts, and with the liberty of determining from all the circumstances, the actual intent of the vendee and the true character of the transaction.

The fourth instruction is, in our opinion, misleading and erroneous. The actual payment of the full value of the property being proven, and there being no evidence in this record from which it can be inferred, either that the vendor was to hold the price for the use of the vendee, or that the vendee was to hold the property for the use of the vendor, except so far as a small portion of the personal property as referred to in the second instruction may have remained in possession of the vendor's wife, the daughter of the vendee, the jury were not authorized to find on this fact alone, any reservation of general use to the vendor, as affecting the fairness and sufficiency of the consideration. The fact that a father purchasing all the property of his son-in-law, permits a small portion of it to remain in the house and for the use of his daughter,

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though it may be, in point of law, conclusive of the voidness of the sale, to the extent of the property thus remaining in possession of the vendor and his family, cannot determine conclusively and as to other property, the question of fact whether the vendee, in making the purchase, intended to defraud the creditors of the vendor or to aid him in the accomplishment of that object. Such a fact with regard to the possession, was not of itself and without regard to the other facts of the case, sufficient to require the conclusion that the whole sale was fraudulent and void.

If the second instruction was intended to authorize the jury to find the sale fraudulent, *per se*, and therefore void as to any of the personal property but that which remained in the use of the vendor and his family after the sale, the remarks just made upon the fourth instruction are applicable to the second, and show that in our opinion, it was misleading and erroneous. It is a harsh rule of law which declares a sale absolutely fraudulent and void merely on the ground that the vendee, with whatever motive, leaves the possession with the vendor, and it should not be extended beyond the property actually so left. Beyond this the fact should be regarded as evidence only, and to have such weight as the jury under all the circumstances, may think it entitled to.

Wherefore, the judgment is reversed and the cause remanded for a new trial in conformity with this opinion.

Wilson for appellant; *McHenry and Harlan & Craddock* for appellees.

Brown *vs* Smith.

EJECTMENT.

ERROR TO THE SHELBY CIRCUIT.

Case 99.

Fraudulent sales.

This opinion, with the case preceding, was delivered on the 31st October, 1846, by the present Chief Justice Marshall, at the close of the term, and suspended until this term.

THIS was an action of ejectment by the purchaser under execution, against the prior purchaser of the same land from the debtor. Case stated.

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BROWN
vs
SMITH.

The levy upon and sale of all the defendat's *right, title* and interest in land, passes the land itself.

The objection made to the terms of the levy as being upon the right, title and interest of Johnston in the land, and not upon the land itself, is untenable. The distinction is but nominal and has been too generally disregarded in making levies and sales, for it to be now questioned, whether a levy and sale in either mode is not sufficient, with the Sheriff's deed, to pass to the purchaser such title as the defendant had subject to execution.

The fact that a purchaser of property is apprized of the *intention* of the vendor to hinder, delay or defraud his creditors, is not conclusive evidence of the the same *intention* on the part of the purchaser; but is a circumstance to be left to the jury, that they may determine the *intention* of the purchaser in making the purchase.

But the Court erred in instructing the jury "that if they find from the evidence, that the sale from Johnston to Brown was made for the purpose of hindering, delaying or defrauding the creditors of Johnston, or any of them, in the collection of their debts, the sale was void as to creditors, if Brown knew when he made the purchase, that such were Johnston's intentions; and that a consideration having passed from Brown to Johnston does not make the transaction valid, if he had such knowledge of Johnston's intentions." We do not deem it necessary to enter upon any discussion of this instruction, but refer to the opinion just rendered in the case of *Brown* vs *Force, &c.*, in which similar instructions in reference to the same sale were decided to be erroneous. The question of fraud should have been left to the jury upon all the circumstances, and not upon the isolated fact of Brown's knowledge or ignorance of a fraudulent intent on the part of Johnston, if there was such intent. The knowledge of such intent could at most, afford only a presumption of fraud on the part of Brown, sufficient to establish it, unless repelled by other circumstances. To this extent and no farther, should any instruction have been given as to the effect which the particular fact of knowledge should have in determining the question of Brown's participation in the fraud.

The instructions given on the part of the defendant did not, as is contended, correct the error in the instruction for the plaintiff just noticed. They correctly informed the jury that Brown could not be affected by the fraudulent intention of Johnston, and they must find for Brown, if he himself acted in good faith and without the fraudulent intention of aiding Johnston in hindering, delaying or defrauding his creditors, or unless he made the pur-

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chase with the intention of assisting Johnston in his fraudulent purpose. But the first instruction had laid down a peremptory rule for ascertaining whether Brown did make the purchase with fraudulent intent, or at least for determining whether the sale was void or not, by telling the jury that if Johnston intended fraud and Brown knew it, the sale was void. If they believed these two facts, they could not without violating the principles of this instruction, find the fact of Brown's non-participation in the fraud, and thus the main object of the inquiry before the jury was to be concluded by the determination of a preliminary and inconclusive fact.

If upon any or all of the evidence, we could say that it was conclusively established in the whole case, that Johnston fraudulently contrived the sale for the purpose of hindering, delaying and defrauding his creditors by selling his visible property to another, and putting the price in his pocket, and that Brown, without necessity, made the purchase for the purpose of aiding him in the accomplishment of this object, which we admit his making it with full knowledge of Johnston's purpose, and without taking any means to prevent it, would tend most strongly to prove; there would, in such a state of case, be no reason for a strict scrutiny of the instructions, and no probability that the jury could have been misled by them. But as the evidence is not deemed absolutely conclusive as to either of the facts referred to, it is essential to the authority of the verdict, that the instructions should not have been of a character to mislead or even by their confliction, to confound the jury in their investigation of the facts. If it were doubtful upon comparison of the instructions which have been referred to, whether the jury may not have been misled by the first instruction, to give undue weight to the fact (as they might infer it,) that Johnston intended a fraud and that Brown knew it, we think it manifest from the subsequent course and events of the trial, that they did find their verdict under a misconception of the law.

It appears from the record, that after the case had been fully before the jury for a day or two, without their being able to agree upon a verdict, they submitted to the Court

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BROWN vs SMITH.

the following interrogatory, viz: "If we should believe Brown co-operated with Johnston by making the purchase of the land in order to check the operation of the law in the action of Miss Demaree against Johnston, and yet believe it was not with a view to defraud any one eventually, must we find for the plaintiff." They had been told by the first instruction, that if Johnston intended to hinder, delay or defraud any of his creditors in the collection of their debts, and Brown knew it when he purchased, the sale was void. Their interrogatory implies that they had formed the opinion that the sale was made to hinder and obstruct the course of the legal remedy for the collection of one single debt, and that Brown co-operated in this intent, but not with a view to defraud any one eventually, and they wished to know whether, in this state of case, the sale was void. The Court responded by reiterating in substance, the first instruction, telling them that "if the conveyance from Johnston to Brown was not made with intent to delay the collection of his debts by due course of law, then there was no fraud; but that if, on the other hand, they believed that it was his intention and purpose to delay the collection of his debts by due course of law, and that Brown was aware of such intention, then the deed is fraudulent notwithstanding Johnston may have intended ultimately to pay all his debts." And the jury, shortly afterwards, returned with a verdict for the plaintiff, deciding in effect, that the deed was void.

A debtor may sell property to pay one creditor in preference to another, and a knowledge of such intention by vendee, will not vitiate his purchase.

We cannot avoid the conclusion, that the jury, under the instructions, regarded Brown's knowledge of Johnston's intent as conclusive evidence of his co-operation with it in making the purchase, and we cannot say that they would have found such co-operation to have existed, if they had not supposed that his knowledge of Johnston's intent, was conclusive on the point. But the interrogatory propounded by the jury brings into view another feature of the first instruction, by which their finding was evidently influenced. And that is the proposition, that if Johnston intended by the sale to hinder or delay the legal remedy of one creditor, this was a fraudulent intent, which if known to Brown, would, as the instruction im-

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plies, vitiate the whole sale. Johnston had a right to prefer other creditors before Miss Demaree or any others who may have sued him. And the sale of his property before she had any lien upon it, though made with intent to prevent the effect of her suit, was not necessarily fraudulent and void, if made also with intent to pay other creditors, or all the creditors. We do not admit that a sale, intended to supply the means of paying just debts, is fraudulent and void, merely because it may also have been intended as a means of preventing one creditor from sacrificing the debtor's property, and thus preventing the collection or payment of other debts. The intent to delay certain creditors from the collection of their debts by due course of law, will not necessarily vitiate the sale, though known and so far concurred in by the vendee. If it be made also with the intent, and as the means of paying other creditors or all creditors, and if it be upon terms reasonably calculated to answer that purpose in a satisfactory manner, and to the extent of the value of the property, it would seem unreasonable to condemn it, merely because it may have been intended by the grantor to obstruct some of the creditors in the legal coercion of their debts, although this intention may have been known to the grantee. In this case, more than one third of the consideration of the purchase, was by the terms of the sale, secured to certain creditors of Johnston, by the assumption of Brown to pay their demands, in the greater part of which he was security. To this extent, therefore, he stood substantially as a creditor, and as such, had to that extent at least, a lawful motive and inducement to enter into a purchase of Johnston's property. And although this circumstance may not conclusively determine the character of the purchase as being free from fraud, it tends to show that it was made with a different motive, and should exempt it from the peremptory denunciation made against it by the instructions under review. It is not absolutely certain, though probable, that Brown had heard of Miss Demaree's suit when he made the purchase. But if he did know it, and also knew and intended to defeat the effect of the suit, as a remedy for coercing the debt by a sale under execution, there is neverthe-

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BROWN vs SMITH.

less evidence, from which the jury might have found, as the terms of their interrogatory indicate, that they believed that the payment of that debt, though not secured by the sale, was in truth one of the objects intended, at least by Brown, who mentioned it as a debt to be paid. It appears too, that about two thirds or more of the consideration of the sale were in fact appropriated by Johnston for the payment of his debts, and that an arrangement for discharging the demand of Miss Demaree, by means of another portion of the consideration, and without probable loss to her, was proposed by him. He says that when he made the sale, he did not know the extent of his indebtedness, but supposed the sale would enable him to pay his debts, which he intended to do, and have something left. It appears too, that Brown actually furnished from his own means, a full consideration, amounting to about $6,500 for the property conveyed, and that Johnston had previously made various unsuccessful efforts to sell his land, in which Brown had aided him, and presumably for the purpuse of paying his debts by the sale of his property, which Johnston says was his object in making the actual sale.

These circumstances, with others which need not be enumerated, tend to show that the sale was not intended ultimately to defeat any of Johnston's creditors, but that it may have been intended as a means of raising money to pay them. This inference was not conclusively repelled by Johnston's subsequent appropriation of a portion of the price to other uses, leaving a portion of his debts unpaid. But the jury seem to have believed that the sale was intended by both parties, to obstruct the legal remedy for the collection of Miss Demaree's debt, and as the instructions of the Court imply that believing this fact, they were bound to find the sale fraudulent and void, though they might believe that it was made for the purpose of paying the debts of Johnston to the full extent of the consideration, the verdict can only be regarded as establishing the fact, that the sale was intended to obstruct the collection of Miss Demaree's debt, without negativing the fact that it was also intended as a means of paying debts to the extent of its value, even including

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that of Miss Demaree. If it was so intended, it was not in our opinion, conclusively fraudulent and void, even as against Miss Demaree.

The answer to the interrogatory put by the jury, should have been, that upon the facts stated therein, they were not bound to find for the plaintiff, unless they believed that both parties to the sale intended at the time that the consideration should be withheld from Johnston's creditors; or that they were not bound to find for the plaintiff if they believed that the intent of Brown in making the purchase, was that the price should be appropriated to the payment of all of Johnston's debts, or as far as it would go.

As our object has been merely to consider the principles involved in the instructions, we have referred to the evidence only so far as to show that the jury may have been misled by the instructions, and we only decide that upon the facts assumed in them the jury was not bound to find for the plaintiff. The witnesses objected to by Brown had no direct interest in the event of this suit, and the record could not be used as evidence for or against them in the suit brought by Brown against them, for taking under attachment a part of the personal property conveyed by the same deed now in question. They were, therefore, not incompetent, but their interest in the question would properly go to their credit. In overruling the objection as taken to the competency of the witnesses, the Court might, and if required, should have told the jury that the interest of the witnesses in the question, was a circumstance which, in the estimation of the law, might affect their credit, but that it was for the jury to determine for themselves how far, if at all, this bias may have affected the testimony of the witnesses, and how far their statements were to be believed as true. As the Court was not requested to instruct the jury on this subject, the omission to do so cannot be complained of.

The question how far the acts of Johnston, after the conveyance to Brown, should bear upon the question of fraud, was not made nor decided in the Circuit Court.

For the errors in the instructions as above indicated, the judgment is reversed, and the cause remanded for a new trial, on principles consistent with this opinion.

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KENDALL vs HUGHES.

Cates & Lindsey and Loughborough for plaintiff; *Harlan & Craddock, McHenry and Duncan* for defendant.

DETINUE.

Case 100.

Kendall *vs* Hughes.

APPEAL FROM THE HANCOCK CIRCUIT.

Fraud, statute of.

Nov. 2, 1846.

This opinion, with the two cases preceding, was delivered at the fall term, 1846, by the present Chief Justice, at the close of the term, and suspended until this term.

Case stated.

THIS action of detinue was brought by Hughes against Kendall, to recover two slaves, a woman and her infant child, which Kendall had purchased under executions against John L. Prewitt the former owner, the father-in-law of Hughes; and the sole question involved in the trial was, whether the bill of sale under which the plaintiff claimed these and other slaves, was fraudulent and void against creditors. Seven instructions were given as moved for by the plaintiff, and five as asked by the defendant, except that two of these last were modified by the Court, as will be presently stated. And the jury having found a verdict for the plaintiff, which the Court refused to set aside, the defendant brings the case to this Court.

Of the evidence we need not present a detail. It was of such a character as to authorize and require a strict scrutiny of the instructions in order to sustain the verdict.

Instructions of the Circuit Ct., given at the instance of each party.

Several of the instructions assume hypothetically that J. L. Prewitt made the sale with the intent of defrauding his creditors thereby, and that this intent was known to Hughes at the time. The Court properly instructed the jury as moved for by the plaintiff, that the fraudulent intent of Prewitt could not affect him, unless he participated in it at the time of the sale. And the instructions asked for by the defendant, to the effect that if Hughes made the purchase, knowing the fraudulent intent of

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Prewitt, it was void, and they must find for the defendant, was properly refused in the terms in which it was asked.

For such knowledge in the purchaser was not in itself conclusive evidence of his participation in the fraud, so as necessarily to make the sale void without regard to other circumstances: *Brown* vs *Foree, &c. and same* vs *Smith, (decided at the present term.)* It may be that by the refusal to give these instructions as asked, and by so modifying them as to require as an additional condition essential to the conclusion that the sale was void, that Hughes should have made the purchase, to favor or further the fraudulent object of Prewitt, the jury may have been misled into the supposition that his knowledge of the fraudulent intent, was not alone sufficient evidence of his participation in it. But certainly the purchaser's knowledge of the vendor's fraudulent intent in making the sale, affords a presumption of his participation in that intent, which will authorize the conclusion that he did so participate, unless the inference be repelled by circumstances tending to show that he had sufficient lawful inducement to make the purchase, or that he took precautions against the intended consequences of the sales, or unless in some other way, the inference is repelled by the facts of the case. It is true that the purchaser must make the purchase to favor or further the fraudulent intent. But his knowledge of the intent tends to prove that he did make the purchase to favor or further it, and is sufficient unless this inference be repelled by the other facts. The jury, under the circumstances above stated, may have supposed that it was insufficient to authorize a verdict against the sale, unless some other fact were established tending more directly to prove a design on the part of Hughes to favor or further the fraudulent object of Prewitt. If, therefore, the Court, after declining to instruct the jury as asked by the defendant, thought proper to instruct them in his own language as to the effect of the purchaser's knowledge of the vendor's fraudulent intent, it would have been more safe to instruct them that upon these facts they might find the sale void, and should do so unless from other circumstances or under all the

The knowledge of a purchaser that the vendor of property intends to defraud his creditors, does not *in all cases*, of itself, render the sale fraudulent as to creditors and purchasers; but it creates a presumption of a fraudulent participation, which will authorize the conclusion, unless repelled by other facts and circumstances showing a lawful inducement to the purchaser.

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KENDALL vs HUGHES.

facts, they believed that Hughes did not participate in the fraudulent intent of Prewitt, or did not make the purchase with a view to favor or further that intent. It is not necessary in this case to decide whether the modification actually made, would alone be sufficient ground of reversal.

To instruct the jury "that fraud cannot be presumed, but must be proved like any other fact," decided to be misleading.—— Fraud may be presumed if there be sufficient evidence of other facts which will authorize the inference of fraud.

The instruction No. 3, given for the plaintiff, that the fraudulent intention cannot be presumed, but must be proved like any other fact, is obviously misleading. Fraud or any other fact may be presumed, if there be sufficient evidence of other facts which authorize the inference of fraud.

As between vendor and vendee, the title passes by sale without actual delivery of possession; but in cases involving the question of fraud, it cannot be disregarded.

The 6th instruction, to the effect that when two persons live on the same place, the possession in law of slaves, is in the person having the legal right to them, if true in the terms in which it was given, could have little bearing on the case, unless to authorize the inference by the jury, that as the bill of sale transferred the legal right it also transferred the possession; whence they might also infer that no further change of possession was necessary to make the sale effectual, (so far as possession was concerned,) against all persons. This instruction was calculated to mislead. The principle of law by which the legal title to personalty, *prima facie* and constructively, draws to itself the possession, and under which the sale of personalty in the same house with vendor and vendee, may be complete and pass the possession in law without any actual manu tradition, if applicable at all to a case involving the question of fraud, has no legitimate operation in a case where the parties in fact live separately, and the vendee leaves the property in the ostensible possession of the vendor. It amounts to nothing more in such a case that as between vendor and vendee, the title passed without actual delivery of possession. But in the question of fraud, the actual possession cannot be disregarded. The instruction as given, tends rather to confuse a jury and to obscure the real question in issue.

In questions involving the question of fraud in

And of similar tendency is the first instruction which tells them that if they find the slaves to be the property of the plaintiff, they must find for him. The slaves were

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his property as against all the world except creditors, and against them unless the sale was fraudulent. The sixth instruction tells the jury "that if Hughes, in good faith, purchased the slave, Harriet, (the mother of the infant born after the sale,) from J. L. Prewitt, who delivered the possession of her to the plaintiff, and he placed her in the possession of Wm. F. Prewitt for hire, in law the possession was in the plaintiff, and the fact that J. L. Prewitt lived on the same place with Wm. F. Prewitt, did not make the latter an improper person to take possession of the slaves, if the transaction was otherwise fair and *bona fide*." The fact as proved was, that Wm. F. Prewitt was a minor, living in the same house with his father, J. L. Prewitt; that some months before the sale of the slaves, J. L. Prewitt had assigned to him, (without the knowledge of the neighborhood,) the bond which he held for the title of the land on which he lived, taking his note for the price; that Wm. F. also promised to support his father and family, and continued as before, to manage the farm and control the laborers, and that there was no ostensible change either after the assignment of the bond or after the sale of the slaves to Hughes.

a purchaser in the sale of property, to instruct the jury, "that if they find the slaves to be the property of the plaintiff——they should find for him," is misleading, they may be the property of plaintiff against all the world except creditors and purchasers as to whom the plaintiff may not be entitled to recover.

We think then, that this sixth instruction is liable to the objection that it rather colors or assumes too strong, the facts with regard to the residence of the Prewitts, and also to the objection that it introduces, with probable misleading effect, the principle of constructive possession before referred to. True, the whole is qualified by the condition that the jury should find that Hughes purchased, in good faith, and that the transaction, irrespective of the possession, was fair and *bona fide*. We do not know precisely what idea was conveyed to the jury by the words expressing this condition. The instruction, however, seems to imply that the jury might determine the question of fraud without looking to the state of the possession, and that unless without regard to that fact, they should find the sale fraudulent, the circumstance that the possession was left with Wm. F. Prewitt, was immaterial, or that this was in fact, a sufficient change of the possession to answer the requisition of the law. But certainly there was no such conclusive evidence of good faith

Instructions to the jury should not assume facts which it is the province of the jury to decide, but be hypothetical upon their belief from the evidence of the fact supposed; and should not conclude that plaintiff is authorized to recover upon their belief from the evidence, of part only of the facts necessary to authorize the recovery.

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KENDALL vs HUGHES.

or of the absence of fraud as authorized the exclusion of the fact of possession from the consideration of that question. Where the question of fraud is an open and doubtful question of fact, the state of the possession is in all cases, entitled to influence and must be considered in determining the question. In many cases it is itself conclusive of fraud, and is so in the present case, if the formal change of possession was colorable only. And if it were not, the state of the possession was still a circumstance tending to give character to the transaction, and which, therefore, could not properly be excluded in inquiring into its character. The instruction was misleading and erroneous in authorizing its exclusion. The leaving of the possession with Wm. F. Prewitt, under the circumstances, authorized unfavorable inferences as to the motives of the purchase, and he was, therefore, in view of this inquiry, an improper person to receive it, and especially when the requisite publicity and certainty with regard to the fact and objects of his possession were not secured, but the possession was left in such a condition as might deceive and impose upon others.

A vendee left slaves in the possession of a son of vendor, a minor, on the same farm. Held that the acts of the vendor in regard to the property, might be considered by the jury in determining the character of the transaction.

The 5th and 7th instructions for the plaintiff speak of declarations of ownership by J. L. Prewitt after the sale, and of occasional directions by him to the slaves after they were delivered to Wm. F. Prewitt. The 5th informs the jury that such declarations were not evidence of fraud, &c., and the 7th informs them that if the jury believe from the evidence that Hughes purchased the slaves in good faith, and delivered them to Wm. F. Prewitt to keep for him, occasional directions to them by J. L. Prewitt while living in the same family with Wm. F., were not inconsistent with his possession and right, so as to constitute the transaction fraudulent, if otherwise it was fair and *bona fide*. Here again the facts as indicated in the instruction, do not properly characterize the real facts to which they probably intended to relate. J. L. Prewitt seems to have mortgaged some of the slaves after the sale, appropriated the hire of others, and received the proceeds of the labor on the farm. He concealed the slaves when the officer came to levy the execution, and

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Wm. F. Prewitt, though present, and applied to for aid by the officer, intimated no agency on his part, or claim on the part of Hughes. At least the evidence conduces to prove these facts. But besides this, it is to be remarked, that as the plaintiff's case rests upon the assumption that he left the slaves with Wm. F. Prewitt as his agent or trusted bailee, his own ignorance of the declarations and acts of J. L. Prewitt in his absence, does not necessarily prevent them from being evidence against him, if they were known to his agent and acquiesced in by him. And further, by leaving the possession with a minor in J. L. Prewitt's family, after he had made an absolute purchase, and without giving notoriety to his own title and to the possession of Wm. F. Prewitt, he put it in the power of J. L. Prewitt to continue his acts of ownership and control, by which others were deceived, and his title must be subject to the inferences arising from the subsequent declarations and acts of J. L. Prewitt in connection with the property. They in fact characterize the state of the possession after the sale, constitute a part of it, and in enquiring into the real intent of the parties, these facts must be considered with others which tend to elucidate the transaction. We are of opinion therefore, that the 5th and 7th instructions, in their application to the actual case, were misleading and erroneous.

It should be stated, that it does not appear that Hughes when he made the purchase, occupied or acquired to any extent the attitude of a creditor of J. L. Prewitt. And as in view of the nature of the question of fraud as being one peculiarly within the province of the jury, we think conclusive efficacy should not be given by the Court to the single fact that the vendee knew of the vendor's fraudulent intent if it existed; so on the other hand, we are of opinion that no circumstance which tends to elucidate the intent of the parties should be withheld from the jury, but that all should be fully submitted for them to give such weight to each, and to draw such conclusion from the whole as they may deem proper, with such aid by the Court with regard to the legal effect of the facts as may be properly given.

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SCRIVENOR, &C. *vs* SCRIVENOR, &C.

Wherefore, the judgment is reversed, and the cause remanded for a new trial in conformity with this opinion.

Cates & Lindsey and J. C. Walker for appellant; *Harlan & Craddock* for appellee.

CHANCERY.

Case 101.

Scrivenor, &c. *vs* Scrivenor, &c.

ERROR TO THE ESTILL CIRCUIT.

Chancery jurisdiction. Fraudulent conveyances.

June 8.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

IN 1831, when B. E. Scrivenor conveyed his land to his father, James Scrivenor, by absolute deed, he was a trader, purchasing hogs on credit, borrowing money, and inducing others to become his security. The deed though absolute, was not founded on a real purchase and sale, but was intended only to indemnify the grantee against loss as the grantor's surety. It was not recorded nor lodged for record until six years after its execution, when the grantor had become greatly indebted, and was probably insolvent. These parties, though admitting in answer to a direct charge that the deed was intended only as an indemnity, do not attempt to specify the liabilities which it was intended originally to secure, nor those which were subsequently incurred in faith of it; and do not state nor attempt by proof to designate the debts, loans, liabilities or assumptions of debts which were finally satisfied by the land, and might form a consideration for its purchase; but content themselves with saying that the deed was intended to indemnify the grantee, James, from loss as the grantor's surety, and that the grantee has paid for the grantor "as much on those suretyships and otherwise, as the consideration named in the deed, and as much as the land was worth, which never was refunded to him." Several debts and liabilities, some of which existed as early as 1837 and 1838, were secured by formal mortgage upon other property, between the same parties, and dated only a few months after the deed for the land was proved and recorded. And there is

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nothing to show, nor is it even alledged, that these debts and liabilities are different from, or do not include those referred to in the answer, as constituting payment for the land. It is, moreover, conclusively shown that notwithstanding the execution of the deed, and until some time after these suits were brought in 1841, the grantor remained in possession of the land, using and apparently claiming it as his own by listing it for taxation and otherwise, just as he did before; and that he continued to purchase on credit and to borrow and become indebted until his credit, doubtless founded in part upon the possession and apparent ownership of this land, was entirely lost. The deed has thus been, evidently, a means of deceiving and defrauding others; and there is some ground to infer that it was originally so intended. At any rate, it has by being so long kept secret, and finally put upon record after the grantor had become embarrassed, and without any designation of the real consideration, been made the instrument of fraud against the creditors of the grantor. And if it can be deemed good to any extent as an indemnity or mortgage, it seems to be fraudulent as an absolute conveyance.

A son, a trader, made to his father an absolute deed for his land, intended as an indemnity, which was held up and not recorded for six years, whilst the son enjoyed the land and continued to trade, and became insolvent, when the deed was recorded. Held that the creditors of the son might by bill in equity, under the statute of 1838, (*St. Law*, 116,) subject the land to their demands, even tho' the grantee might be entitled to indemnity for suretyship and advances under the deed as a mortgage.

This, as we think, gives the Chancellor, under the act of 1838, (3 *Stat. Law*, 176,) jurisdiction in behalf of general creditors to investigate the fraud, ascertain the demands due to the complaining creditors, and subject the land so far as is equitable, to the satisfaction of their debts, even though the grantee should be entitled to the benefit of the deed as a mortgage and ultimate security for any just demands not actually secured by the other mortgage, and which may appear to have been really and in good faith, intended to be covered by this deed.

We are of opinion, therefore, that the Court erred in dismissing the several bills so far as they seek to subject the land to the demands of the complainants respectively, and that the disposition of the case as to the land, should be postponed to the final hearing, when upon ascertainment of the several demands of the complainants and of James Scrivener against the defendant, B. F. Scrivener, and of the extent of the indemnity furnished by the other mortgage, and of all facts pertaining to the subject,

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MATTINGLY'S HS. vs CORBIT.

it may be advisedly determined how far James Scrivener should be allowed any preference in the appropriation of the land.

Wherefore, the decree is reversed and the cause remanded for further proceedings consistent with this opinion.

S. Noland for plaintiffs; *Turner* for defendants.

CHANCERY.

Case 102.

Mattingly's Heirs *vs* Corbit.

APPEAL FROM THE MARION CIRCUIT.

Jurisdiction. Devastavit. Practice. Pleading. Sureties. Limitation.

June 18.

JUDGE BRECK delivered the opinion of the Court.

That a party has no legal remedy is a good ground of equitable jurisdiction, as no suit at law for a *devastavit* is maintainable without a judgment at law.

IN answer to the objection to the jurisdiction of a Court of equity in this case, it may be remarked, that the fact that Simeon Mattingly, the administraror or former administrator of Mary Mattingly, had become a non-resident, is alone deemed sufficient ground upon which to rest the jurisdiction. Corbit, who held the note upon Simeon and Mary Mattingly, could obtain no judgment thereon at law, against Simeon, as administrator, without which he could not proceed upon the administration bond against Vancleve, the surety, for a devastavit. Being utterly remediless at law, the creditor, upon that ground alone, might resort to a Court of equity for relief. Whether there are or not other grounds, which would give jurisdiction to the Chancellor, we will not stop to inquire.

The objection that the Court below erred in permitting the complainant's counsel to introduce upon the trial the vouchers accompanying the several reports of settlements by County Court Commissioners, is not valid. The vouchers, as has been held by this Court, constituted a necessary part of the report; and the reference to the reports by the defendants, necessarily included the vouchers. The Court was, therefore, right upon the introduction of the report by the defendants, in permitting the complainant to bring in the vouchers.

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MATTINGLY'S HEIRS vs COBBIT.

In view of the whole testimony, it sufficiently appears that there remained in the hands of Simeon Mattingly as administrator, assets sufficient for the payment of the complainant's demand. The assets were sufficient, without taking into the estimate the rent of land or hire of slaves, neither of which appear to have belonged to the estate of Mary Mattingly, but to the estate of John Mattingly, and of course for such rent and hire, the security in the administration bond would not be responsible. While the fund arising from the land and slaves was in the hands of S. Mattingly, payments by him to the heirs of Mary Mattingly, who were also the heirs of John Mattingly, should be regarded as made out of that fund.

A reference to the report of the settlement of an administration account, necessarily implies a reference to the vouchers accompanying the report.

The defendants, we think, failed in the effort to show that S. Mattingly, as administrator, was entitled to any credit on account of the bad debts. It is not very clearly shown that Mary Mattingly was the security for her son upon the note in contest, but even conceding that she was, we are not satisfied that there was any such contract or arrangement between S. Mattingly and complainant, for delaying the payment or collection of the note as would release the heirs of Mrs. Mattingly or any of the defendants from liability. We are further of opinion that none of the defendants, conceding Mrs. Mattingly to have been a mere surety, have shown themselves discharged from liability in virtue of the act of 1838, limiting actions against sureties: (3 *Stat. Law*, 559.) The note in this case was due on the 25th December, 1836, and this suit was commenced on the 6th March, 1844. Deducting six months, during which time suit could not be brought against the administrator and heirs, and which is allowed by the statute, from the period between the accrual of the action and the institution of this suit, and less than seven years would have elapsed after the action accrued and before the suit was instituted.

A surety, according to the statute of 1838, (3 *St. Law*, 559,) is not released until the lapse of seven years after the cause of action accrued, or 5 years upon

According to the construction which we think should be given to the third and fourth sections of that act; and which was recognized by this Court in *Lewis* vs *Harbin*, (5 *B. Monroe*, 561,) the surety would not, in any case, be discharged in less than seven years after the cause of action accrued. The effect of the fourth section is to

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give five years upon contracts executed before the passage of the act, although seven years may have elapsed from the time the cause of action accrued before the expiration of five years after the passage of the act. Besides, the limitation was not so plead and relied upon as in any view of the case to render it available.

contracts executed after the passage of the act, tho' seven years may have elapsed from the time the cause of action accrued before the expiration of five years from the passage of the act.

The heirs of Mrs. Mattingly deny, and it is not shown that any thing descended to them from her estate.

It is error to decree in *personam* against a non-resident who had no estate within Kentucky, and who was not served with process.

It results from the view we have taken, that the complainant was entitled to a decree against Vancleve as the surety of S. Mattingly in his administration bond, but we think he was not entitled to a decree against S. Mattingly in *personam*, and that the decree against the heirs of Mrs. Mattingly is also erroneous. S. Mattingly being a non-resident, and there being no estate or fund belonging to him within the jurisdiction of the Court, attached or sought to be subjected to the complainant's demand, the Court had no jurisdiction to decree against him personally, as decided by this Court in *Manifee's heirs* vs *Hynman, &c*, (3 *Monroe*, 406, *and other cases.*)

It was also irregular to direct the decree to be first levied of assets of Mrs. Mattingly, in the hands of her administrator, S. Mattingly, if any could be found. If any decree could have been rendered against the administrator, it should have been *de bonis propriis.*

The decree against the heirs is to be levied of the estate of Mary Mattingly, which had descended to them.

The heirs deny that any estate had descended to them, and the fact is not established by the testimony. It was, therefore, according to the case of *Wells* vs *Bowling's heirs*, (2 *Dana*, 46,) erroneous to decree against them for assets *in presenti*, or to be levied of estate which had descended.

The decree must be reversed and the cause remanded, that a decree may be rendered against Vancleve for the complainant's demand and his costs; and as to the heirs, his bill will be dismissed unless he should elect to take a decree against them to be levied of such estate descended from their ancestor or mother, as may hereafter come to their hands. In either event as between the complainant and the heirs, each party will pay their own costs.

Shuck for appellants; *Morchead & Reed* for appellee.

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Richardson *vs* Parrott's Heirs.

CHANCERY.

ERROR TO THE WASHINGTON CIRCUIT.

Case 103.

Infant's real estate. Interest. Mortgage.

JUDGE BRECK delivered the opinion of the Court.

June 25.

Case stated.

IN 1839, the heirs of Parrott filed their petition in the Washington Circuit Court, and obtained a decree for the sale of a large tract of land and several slaves, which had descended to them from their ancestor.

At the sale made by the Commissioner, Richardson became the purchaser of the land, and executed his notes with security, to the heirs for the purchase money, payable in three annual instalments, as required by the decree. The sale was reported by the Commissioner, and confirmed by the Court; and the same Commissioner was appointed to collect the purchase money and pay it over to the heirs, and when collected, to make a deed to the purchaser.

The purchaser paid the Commissioner about $1,500 upon the first note, and an arrangement was then made between the adult heirs and the guardians of the infants, and the Commissioner and Richardson, by which the latter, with the same sureties, executed his notes to the heirs severally, for their respective portions of the residue of the purchase money, and took up the original notes; the Commissioner made him a deed for the land, and he executed a mortgage thereon, and upon other property, slaves and personalty, to secure the payment of the new notes. This arrangement was made in September 1841, a few days before the second instalment became due.

The Commissioner subsequently reported to the Court, that he had collected and paid over the purchase money to the heirs, and also reported a deed, which, as directed, he had made to the purchaser. The deed was confirmed, and the case was stricken from the docket.

Richardson subsequently executed two other mortgages, including other property, and to secure the payment

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of other debts, as well as those or portions of those provided for in the first mortgage.

In 1842, George W. Parrott exhibited his bill seeking a foreclosure of the mortgages, and also an attachment, which was awarded him, against the slaves and personalty included in the mortgages. All the proper parties were made and brought before the Court.

The bill and its object.

Richardson immediately answered, made his answer a cross bill, and sought a rescission of his purchase of the land, upon the alledged ground that the sale made under the decree was void; that the heirs had no title to a portion of the land; that to other portions of it was defective and incumbered with dower; that by the fraud and combination of the complainant and others, he had been induced to go into the arrangement, and give new notes, and execute the mortgage; that the title of the heirs had been fraudulently represented to be good, and he had but recently discovered that it was defective; that the Commissioner had no authority to make the deed at the time; that suit was then pending for a portion of the land. He also alledged that he was entitled to certain credits upon the new notes, and he called upon the parties to produce and file them. He tendered back the land, and prayed that the purchase money which he had paid might be refunded, and for general relief.

The answers.

The defendants resisted the relief sought, denied all the allegations of fraud, insisted that the sale was valid, and the title to the land good.

Decree of the Circuit Court.

The Court below, after requiring bond with surety to be executed by the adult heirs of Parrott to Richardson, warranting the title to the land, decreed a foreclosure of the mortgages, and a sale of the mortgaged property for the payment of the mortgage debts.

To reverse that decree, Richardson prosecutes this writ of error.

The first and most important question presented for consideration, is whether the Court below erred in not decreeing a rescission of the contract in regard to the purchase of the land by Richardson. In view of that question, we will first enquire as to the alledged invalidity of the sale as made by the Commissioner.

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It is contended the sale was unauthorized and void for the following reasons:

1st. That the petition for a sale was in the name of the heirs by their guardians, and not in the name of the guardians.

2d. That G. W. Parrott, an adult heir, united in the petition.

3d. That affidavit to the petition was not made by the guardians.

The act of 1813, under which this proceeding was had, authorises the guardian to apply by petition to the Circuit Court for a sale of his ward's, or the infant's estate. It is not in express terms provided that the petition shall be in the name of the guardian, but such is very clearly the inference, from the first section of the act. From a clause in the 2d section, however, it seems equally clear that the heir or infant was to be a petitioner. But even conceding that it would be more strictly in conformity with the act, that the petition should be in the name of the guardian, yet we are inclined to the opinion, that a petition in the name of the infant, by his guardian, and when, as in this case, it is manifest the application was in point of fact by the guardian, would be clearly within the spirit of the act, and should be deemed equivalent to a petition in his name. As satisfactory evidence that the petition in this case was virtually the petition of the guardians, they all appeared in Court and executed bonds as required by the statute, and which were approved by the Court prior to the decree for a sale. We are of opinion, therefore, that the first objection did not affect the jurisdiction of the Court or the validity of the sale, and could not even by the infants be rendered available to disturb it. Such also is our opinion as to the second objection. Whether the consent to a sale by the adult heir is indicated in the petition or by an answer when brought before the Court by summons, as required by the statute, cannot, it seems to us, be deemed material. His consent would be equally binding and conclusive upon him in the one way as in the other, and the object of the statute in requiring him to be brought before the Court, is fully attained by his joining in the petition.

A petition in the name of the infant by his guardian for the sale of real estate, is a conformity with the statute, and equivalent to a petition in the name of the guardian. The uniting of an adult heir is a valid expression of assent to the sale as an answer would be.

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RICHARDSON vs PARROTT'S H'RS.

That the petition is not sworn to will not render the sale invalid, (*B. Monroe*,176) and *Lampton* vs *Usher's heirs* (7 *B. Monroe.*)

The failure of the guardians to make affidavit to the petition is a more substantial objection, but not one which the infants could render available for disturbing the sale.

As was held by this Court in *Gates* vs *Kennedy, &c.*, (3 *B. Monroe*, 167,) and in *Lampton* vs *Usher's heirs*, decided at the last term of this Court, it would not render the decree or sale void, the affidavit not being essential to give the Court jurisdiction.

The proceedings in other respects in regard to the sale, appear to have been regular and in compliance with the statutory requisitions. We are, therefore, of opinion that the objection raised to the commissioner's sale constituted no ground for a rescission.

Upon the sale of infants estate upon credits, the purchaser paid one instalment, and for the residue gave his bonds and mortgages to the adult heirs and guardian of the infants. Held that upon receipts being passed to the Com'rs. that he might convey, and that his conveyance accepted by the purchaser and confirmed by the Court, passed the title of the heirs.

The validity and effect of the commissioner's deed present the next subject of inquiry. It is insisted that in point of fact, the purchase money was not all collected nor all due when the deed was executed, and for that reason that the Commissioner was not authorized to make it. It is true when the deed was made, only a portion of the first note had been actually received by the Commissioner, but all the notes had, nevertheless, been taken up and discharged. The proceeds of the sale had been distributed among the heirs and for the part not actually paid in money, new notes for their respective portions had been given to them or their guardians, with additional security, and upon long credits. Receipts were executed to the Commissioner, which, together with the deed, were reported to the Court, and the whole confirmed. The arrangement it appears, was well understood, made by the consent and was supposed to be for the benefit of all parties concerned. There is no evidence that it was effected through misrepresentation or fraud on the part of the heirs as charged. It was an object, as set forth in the petition for a sale, to render the estate of the infants more productive by realizing interest upon the proceeds thereof. This object was as effectually attained by loaning the money to Richardson, if well secured, as to any other person. Richardson desired more time, as he was unable to meet the payments according to the terms of the sale.

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Under the circumstances, therefore, we are inclined to the opinion that the arrangement, as to that portion of the purchase money not actually paid, should be regarded as equivalent to the payment thereof, so far at least as the Commissioner was concerned, and as to authorize him to execute the deed. But even if this position were questionable, as the deed was actually made by the Commissioner, accepted by Richardson and approved and confirmed by the Court, it was, in our opinion, valid to pass the title and interest of the heirs. That the deed was accepted very satisfactorily appears. Besides other evidence, it is manifest from the recitals in the mortgage from Richardson to the heirs. But it is insisted that the acceptance of the deed under the circumstances of this case, did not place Richardson in the attitude of an ordinary purchaser under an executed contract. Whether he should, in strictness, be regarded in that light and as being thereby concluded upon the question of a rescission, except upon the ground of fraud, it is not important to decide, as we are not satisfied, in any view of the case, that he has manifested a right to relief to that extent. All the allegations of fraud are denied and are unsupported by the testimony. When the sale was made, so far as appears, the title was not known nor supposed to be defective or doubtful. Nor is it shown that there was any doubt entertained in regard to its validity when the deed was made and accepted, except as to a dower claim to a small portion of the tract, of which Richardson was fully apprised. In the whole tract sold there was near five hundred acres, which had been purchased by the ancestor of the heirs, at different periods and in different parcels. Possession of nearly the entire tract had been held by him and the heirs for more than twenty years. But it is true that flaws in the title to some portion of the land have been discovered, but not of a character and to an extent in any view of the case, to justify a rescission. They were discovered, it seems, by Richardson, about three years after his purchase, when the land had somewhat declined in value and he found his means inadequate to pay for it.

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RICHARDSON vs PARROTT'S H'RS.

But notwithstanding sufficient ground is not made out for a rescission, yet we think he had sufficient ground for the exhibition of his cross bill, and manifested, to some extent, a right to relief. The Commissioner's deed contains a clause of general warranty as to all the heirs, and was no doubt made and received under an erroneous impression that it was properly so drawn, and was obligatory upon them. As to the adult heirs, having been made not only by their consent but at their instance, it may be binding upon them, but we are inclined to the opinion it is not upon the infants.

In the sale of the real estate of infants, only their legal and equitable title is sold, and that alone should be conveyed. No warranty can be added against adverse titles.

The statute authorizes a deed of bargain and sale to be executed by the Commissioner to the purchaser and declares that it shall invest him with all the right, title, interest and claim, at law as well as in equity, which the infant had in the premises. It is silent, however, as to any liability which the infant was thereby to incur in regard to the title. A sale merely of the title and interest of the heir, seems to have been contemplated; no express authority for binding him in the conveyance for the title is conferred, and in our opinion none can be implied.

But Richardson not only may be presumed to have accepted the deed, supposing it to be obligatory upon the heirs, but the testimony conduces strongly to prove that he may have been led to believe that such was to be the character of the deed from what transpired at the sale in regard to the terms thereof. In this view of the deed and the circumstances under which it was accepted, and inasmuch as the title to some extent, appears defective, we think he was entitled to an indemnity, at least equivalent to the warranty in the deed, as required by the Court. This was more manifestly proper and equitable, as the heirs were appealing to the Chancellor to enforce their liens upon the land for demands arising out of the purchase money.

As Richardson, therefore, was entitled and obtained relief upon his cross bill, the Court erred in not decreeing him his costs.

But the decree is also, in other respects, deemed erroneous. G. W. Parrott alledges that the notes which he

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held upon Richardson, were unpaid except $55, paid on the 4th October, 1841. Richardson alledges in his cross bill that he was entitled to a credit for the $55, and also for $185, and to a note for $143 on Forsyth, which he had delivered or transferred to G. W. Parrott. He denies that he has received credit for these sums, and calls for the filing of all his notes held by the mortgagees. None of the notes appear to have been filed, except a note payable to one of the guardians. G. W. Parrott admits in his answer to the cross bill, the payment of the $55, and says it is credited upon the note which he holds upon Richardson. The payment of the $185 he avers was paid before the settlement, when the notes were executed, and was taken into the estimate and credited. He admits receiving the note upon Forsyth, but says he received it as a member of the firm of Parrott & Robertson, to whom it was assigned, and that Richardson was credited upon their books for the amount. In the second mortgage made in July, 1842, Richardson provides for a debt due Parrott & Robertson, by account for merchandize for $150. Whether the note on Forsyth was received in part of that account, does not appear. In view of these facts, the Court erred in decreeing G. W. Parrott the whole amount of his claims embraced in the mortgages, without any credit. It is manifest Richardson was entitled to a credit for the $55 as against G. W. Parrott, and not entirely certain that he should not have been credited for the $185. When the $143 note was assigned to Parrott & Robertson, does not appear. They do not exhibit their account. Before decreeing the whole amount of their claim, they should have been required to exhibit their account. And it seems to us, under the circumstances of this case, manifestly proper that all the mortgagees should have been required to file their notes. They were the best evidence of the amount of the claims secured by the mortgages. Besides the mortgages do not state the times when the notes respectively fell due, although the periods from which they bore interest are stated. Some of them, according to the answer of Parrott, were payable four and five years after date, and but for an alledged stipulation, they were to become immediately due upon

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RICHARDSON vs PARROTT'S H'RS.

the failure to pay the annual interest, they would not have been due when the decree was rendered. It is true Richardson might have obtained a rule upon the parties to file them, but having called for their production in his answer, the Court might well have required them to be filed without a rule; and if not satisfied upon their inspection in regard to the credits claimed by Richardson, might and should have directed an inquiry.

Interest is properly decreed upon a liquidated account secured by mortgage.

The objection that interest upon the claim or account of Parrott and Robertson from the date of the mortgage was decreed, is not tenable. The demand appears to have been liquidated, and interest was, therefore, properly decreed.

It is further insisted, that the Court erred in not giving longer day for the payment of the sums decreed against the mortgagor.

The decree *nisi* required the payment to be made on the day following, and not being paid, a decree on that day was rendered for the sale of the mortgaged property.

On decree, the payment of money secured by mortgage, day should be given for payment in the sound discretion of the Chancellor. This is not matter of form, but reasonable time to be determined by the circumstances of the case should be given, from one term to another is usual.

The object in giving day, is to afford the mortgagor an opportunity to redeem by paying the money. It is not a mere matter of form. Such being the object, a reasonable time, under the circumstances, should be allowed for accomplishing it. What would be reasonable time, must rest in the exercise of a sound discretion by the Chancellor. The general practice in this State, we believe, has been to give until some day in the succeeding term. It was so considered by this Court, in *Martin* vs *Wade's executors*, (5 *Monroe*, 80,) and that, we think, would in general be reasonable time; but as there is no fixed rule of law upon the subject, the time to be given should depend very much upon the circumstances of the case, to be judged of by the Chancellor.

The decree *nisi* in this case, required in effect, the payment to be made *instanter*, and nothing in the record is furnished to justify such extreme rigor. The amount was large, near $10,000, and we think that the usual time should have been given, and that the time given was unreasonable. The proposition of the Court, to give longer time, if the mortgagor would give bond for the rent and forthcoming of the property, did not cure the error,

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in requiring the immediate payment of the money. If such a requisition, under any circumstances, should have been made, we think it should not have been, under the circumstances of this case. By an order of the Court, upon the exhibition of the original bill, the mortgagor, in order to retain possession of the personal property and slaves, had been required to give bond for the forthcoming thereof to abide the decree of the Court. Such bond had been given, and was still in force.

For the errors indicated, the decree is erroneous, and should be reversed. But as the parties have filed an agreement in the cause, to the effect, that if this Court should be of opinion that Richardson had not made out sufficient ground for a rescission of his purchase, but that the decree upon other grounds was erroneous, that it should nevertheless only be reversed so far as it relates to the sums improperly decreed against him in favor of the mortgagees. If this Court should be of opinion, that in that respect the decree was erroneous, and to the extent that Richardson in that behalf was entitled to relief, that the cause should be remanded, with directions to render a decree against the proper parties in his favor, for such sums as had been improperly decreed against him.

We are of opinion that Richardson was entitled to a credit of $55, with interest from the 4th November, 1841, as against the claims of G. W. Parrott. The presumption is, that he was also entitled to a credit for the alledged note on Forsythe for $143, as against the claims of Parrott and Robertson. And there is some reason to believe that he has not been credited for the $185. As to the two last items, the case will be open upon the return of the cause, for reference to a Commissioner, and for further proof.

The decree is also erroneous in decreeing the entire costs of the mortgagees against Richardson. He should have been decreed his costs upon his cross bill.

As to the items thus designated, the decree is reversed, and the cause remanded for further proceedings, and such decree as may be found equitable and consistent with this opinion. And as to the residue of the decree, under the

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KIRKPATRICK vs WHERRITT, &c.

agreement of the parties, it is affirmed, and Richardson is entitled to his costs in this Court.

Morehead & Reed and Shuck for plaintiff; *McHenry* for defendants.

CHANCERY. *Case* 104.

Kirkpatrick *vs* Wherritt, assignee, &c.

APPEAL FROM THE HARRISON CIRCUIT.

Usury. Surety.

June 25. JUDGE SIMPSON delivered the opinion of the Court.

A surety who has paid usury for his principal, has the right to sue for and reclaim it, unless he has been repaid the money which he paid.

WILLIAMS, the surety of Lair in the debt to Kirkpatrick, having paid the debt, had alone the right to demand and sue for, any usury that it contained. Wherritt, as assignee, of Lair, who became a bankrupt, was only invested with the same right to this usury, that Lair the bankrupt had.

The security having paid the usury, has a right to reclaim it, unless he has been re-paid by his principal, or has in his hands, belonging to his principal, the means of re-payment, or has done some act by which he has divested himself of this right.

It is not pretended that Williams has had this money refunded to him from any quarter. The mortgage executed by Lair to indemnify him on account of this securityship and other liabilities, is wholly insufficient for that purpose, it being proved that it will not pay more than half the amount.

What claim then has the assignee in bankruptcy to this usury? It appears that he has executed a release to Williams of all claim to the mortgaged property and Williams has released to him all claim against the estate of the bankrupt. The substance of this arrangement is, that the assignee deeming the property mortgaged insufficient to pay the debts, and the equity of redemption of no value, has released it; and that Williams, in consideration thereof, has released the balance of his demands against the bankrupt, that may remain unpaid after the mortgage

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property is exhausted. This can give the assignee no equity to this fund. If the property mortgaged had been equal to the debts secured, then it is true, the money paid by the security should be regarded as refunded, and the principal debtor entitled, in equity, to all the usury paid. If Kirkpatrick has received money, that in equity he ought not to retain, out of whose pocket has it been taken? Not out of Lair's—neither his money nor his property has gone that way. Williams has sustained the loss. What reason is there, that he should not have this money refunded? He has not transferred to the assignee his right to it; he has not been repaid; the loss is his. If it should be paid to the assignee, he gets that amount that never belonged to the bankrupt's estate, and that Lair himself would not have a shadow of claim to, were he in a condition to assert his own rights. Any equity that the assignee would have to this fund, must be derived directly or indirectly from Williams, who was consequently a necessary party. If he had been brought before the Court and required to foreclose the mortgage and the property embraced by it, had upon foreclosure, satisfied in full the debt he paid Kirkpatrick, as well as the other liabilities it secures, then the complainant would have an available equity.

The assignee in bankruptcy having brought this suit for the usury, and the Circuit Court having rendered a decree in his favor, it is erroneous and must be reversed, and cause remanded, with directions to dismiss the complainant's bill without prejudice, unless he chooses to amend his bill and bring Williams before the Court, for the purpose herein suggested.

Wall for appellant; *Curry* for appellee.

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CHANCERY.

Hardin and Wife *vs* T. Smith's Ex'or., Appeal; T. Smith's Ex'r. *vs* G. Smith's Adm'r., Writ of Error; G. Smith's Adm'r. *vs* T. Smith's Ex'r., on Cross Errors,

Case 105.

TO THE WASHINGTON CIRCUIT COURT.

Husband and wife. Surcharging settlements. Chancery jurisdiction.

June 28. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The case stated, and grounds of equity set out in the original Bill of Geo. Smith's adm'r.

IN 1823, George Smith being then posseesed of a tract of land of 100 acres, sixteen slaves, old and young, and some personal property, was found to be a lunatic by a jury in the Mercer Circuit Court. Turner Smith was appointed his committee, and continued in that office for about eighteen years, when the committee having died, and George Smith, the lunatic, having also shortly afterwards died, Willis, his administrator, filed this bill against the executrix of Turner Smith, and others, alledging the omission of various items of charge in his accounts, and fraud and mismanagement of the estate of the lunatic, while under the management of Turner Smith as his committee; and the executrix having intermarried with McKitrick, the suit progressed against McKitrick and wife. The bill, among other things, seeks to charge the estate of Turner Smith with the amount of two notes of $200 each, executed by B. I. Head in 1819, and held by Turner Smith, as committee, on the ground that although he might have collected them, he failed to do so, and in consequence of his negligence, they had become worthless.

Answer of McKitrick and wife made a cross bill vs Mordecai Hardin and wife.

Besides resisting this claim altogether, McKitrick and wife make their answer a cross bill, and bring Mordecai Hardin and Jane his wife, before the Court as parties, the latter being a sister, and one of the heirs of George Smith; and they pray that if the estate of T. Smith should be made liable for these notes on Head, they may

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have a decree over for the amount against M. Hardin and wife, on the following grounds: They alledge, and it appears that Jane Smith was first the wife of B. .I Head, the maker of the notes in question, and upon his death became his administratrix; that she afterwards married Henry Hardin, and being again a widow, married one Bently, and after his death married Mordicai Hardin, her present husband; that during her marriage with Henry Hardin, she and Hardin executed a covenant or agreement with Turner Smith, to the effect that if he would not collect these notes from the estate of Head, the amount should be settled as a part of Jane Hardin's interest in her brother George's estate, expectant upon his death. The enforcement of this agreement is resisted by M. Hardin and wife, on the ground: 1st, that when it was made, George Smith being alive, his sister, as heir expectant, had no interest in his estate which could be disposed of. 2d, That she being a married woman, was not bound by the agreement; and 3d, That she was not, in equity, the debtor.

The Court having rendered a decree against T. Smith's executors for a considerable sum, also decreed that M. Hardin and wife should account to them for the amount of said notes and interest, and should have the benefit of the notes. From this decree M. Hardin and wife have appealed, and McKitrick and wife, executors of T. Smith, having prosecuted a writ of error to reverse the decree against them, Willis, the administrator of George Smith, assigns cross errors in this last decree. The cases being all before us on the same record, we shall first notice the decree against Hardin and wife, the propriety of which is questioned by the assignment of errors, not only on the grounds taken in their answer, but also on others of a more formal character.

Decree of the Circuit Court against Hardin and wife.

The decree does not direct Hardin and wife to pay the amount of the two notes, but merely to account for it to or with the executors of T. Smith. No provision is made for any settlement, in which this accounting is to take place, nor does it appear in what manner the executors of T. Smith are to have any benefit from this part of the decree, whether by a new bill in equity, or by action of

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HARDIN & WIFE, *et al.* *vs* T. SMITH'S EX'R. &c.

assumpsit for the value or amount of the notes. But it was obviously intended to secure some benefit to these parties, and to impose some burthen upon the others; and if the latter are not equitably liable to any burthen in the premises, the decree, however uncertain and imperfect, must be deemed prejudicial to them and subject to reversal on their appeal.

7 Mon. 113

The husband and wife cannot make any contract during coverture to dispose of the wife's expectancies as heir to her relations, which will bind the wife after his death.

The claim against Hardin and wife, founded solely on the agreement set up in the cross bill, and not upon any alledged mal-administration of the estate of B. J. Head by his administratrix, nor upon any suggested benefit arising either to her or to her present husband from the forbearance to urge the coercion of the debt against Head's estate. This being the case, the defence relied on by the answer, which is sworn to by Mrs. Hardin, as well as her husband, that she was, when she signed the agreement, a *feme covert*, incapable of binding herself, and that the agreement, therefore, is of no force against her, must be regarded as a complete bar to the relief sought against her and her present husband upon the covenant referred to. There may, indeed, have been a sufficient consideration to make that agreement binding upon such parties to it as were competent to contract. If it was to be and was the inducement for T. Smith's forbearance, this was a consideration, and the representatives of Henry Hardin may be responsible for a breach of his contract. But Mrs. Hardin being incompetent to contract, was not bound by it, and of course it imposes no obligation on her present husband, who can only be responsible by reason of his wife's being so.

Conceding then, that although at the date of this covenant, Mrs. Hardin had no interest in her brother's estate which could be transferred or assigned, a personal contract might have been made, and a personal obligation incurred in relation to the disposition of her expected interest when it should accrue, it is still clear that she being then a *feme covert*, was not bound by the covenant or contract which was then made.

We may observe further, that as the cross bill does not seek for a settlement of the estate of George Smith, in which the interest of Mrs. Hardin might be ascertained

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and distributed, but seeks to enforce this covenant as a mere indemnity, there is no such connection between the case against Hardin and wife and that upon the original bill, as would authorize the former to be brought into the same case by cross bill, even if Mrs. Hardin had been bound by the covenant; or at any rate no relief could have been granted on the cross bill, unless its form had been so altered as to make it in effect a bill for a settlement and distribution of George Smith's estate, in which the executors of T. Smith might be the claimants of Mrs. Hardin's share, to the extent of the amount of these notes on Head. The vagueness of the decree in granting relief, was the consequence of the defectiveness of the cross bill and illustrates its insufficiency.

It is contended that Turner Smith postponed the collection of the notes on Head in consequence of the agreement of Hardin and wife, undertaking that they should be paid by Mrs. Hardin's interest in her brother George's estate, or received in discharge of that interest, and that it would be inequitable to allow her that interest as against Turner Smith's estate, without requiring her compliance. But Mrs. Hardin does not occupy the attitude of a complainant seeking relief; and if she did, it might be proper to consider other facts, or to make other inquiries besides those now brought into view, before we could determine that there was any such equity against her personally, as should preclude her claim. The claim, however, being against her as a defendant, and being founded on her alledged covenant without a disclosure of the circumstances, her plea of coverture is a sufficient answer, and the cross bill against her and her husband should have been dismissed without prejudice.

Wherefore, the decree upon the cross bill against Hardin and wife, is reversed on their appeal, and the case is remanded with directions to dismiss the cross bill as against them.

McKitrick and wife, executors, vs *Willis, administrator.*

Case as between these parties.

Upon the writ of error of McKitrick and wife, executors of T. Smith, against the administrator of George Smith, the principal question relates to the character and

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HARDIN & WIFE, *et al.* *vs* T. SMITH'S EX'R. &c.

effect of certain orders of the Mercer Circuit Court upon settlements made under its authority, with Turner Smith, as the committee of George Smith. Other questions presented by the original and cross errors, relate to the admission or rejection, or proper amount of various items of debit and credit in making up the account of G. Smith's estate in the hands of the committee, T. Smith, and of his executors since his death.

It appears that in 1828, 1829 and 1830, settlements were reported to the Mercer Circuit Court, by one or more Commissioners acting under its appointment, each exhibiting a balance in favor of the committee. The last one stated the aggregate balance at about $1,224, and recommended that the committee be allowed to appropriate a part of the estate for its discharge. These reports were in general terms confirmed, subject to the future investigation of those who might be interested in the estate; and with the same qualification, it was ordered that Turner Smith, the committee, might retain so much of the profits of the estate and of the estate, as would satisfy the reported balance in his favor. Under this order he afterwards reported that he had appropriated four slaves, according to the valuation of individuals who seem to have been selected by himself. Upon this report no final or direct action seems ever to have been taken by the Court. But the committee, Turner Smith, treated these four slaves as his own afterwards, not noticing them as a part of the estate of George Smith in his subsequent annual reports, which seem to have been impliedly confirmed. One of the four slaves thus appropriated by T. Smith, was sold by him within a few years afterwards; and on the same day on which this bill was filed, the complainant, as administrator of G. Smith, commenced in the same Court, an action of detinue for the other three. That action was resisted on the ground that by the decrees of the Mercer Circuit Court and the proceedings under them, these slaves had become the property of T. Smith. But the judgment first rendered for the defendants was reversed by this Court, which decided that there was no final decree vesting the property in T. Smith, and a judgment was afterwards rendered for the

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plaintiff for the three slaves, and for $431, their hire from the commencement of the suit. The three slaves having been delivered, the cross bill of McKitrick and wife prays, among other things, to enjoin this judgment for the hire; and it is now contended that the Circuit Court erred, not only in dissolving this injunction, but in not confirming the appropriation of the slaves made by Turner Smith and all the settlements and reports made in the Mercer Circuit Court.

The decision of this Court in the detinue case, is conclusive between the parties as to the construction and effect of the decrees and proceedings in the Mercer Circuit Court, so far as they affect the legal title to the slaves. It did not, however, conclude nor even touch the question whether the appropriation of the slaves which, though countenanced by that Court and made under its authority, never received its positive sanction, should not be confirmed by a Court of equity. Without undertaking to define the circumstances which might render such a confirmation proper, it is evident that one essential circumstance must be the existence, either then or at least afterwards, of a just balance in favor of the committee, equal to or approximating the value of the four slaves, and which could not well be extinguished in any reasonable time without the appropriation of these or other slaves to its discharge. This proposition involves an inquiry first into the justice of the claim or balance of $1,224 reported in 1830, and then into the condition and circumstances of the estate of the lunatic in the hands of his committee.

After a great lapse of time settlements made and reported by fiduciaries, that have received sanction of a judicial tribunal, will *prima facie* be deemed correct.

The great lapse of time covered by the accounts between Turner and George Smith, commencing four or five years before the inquest of lunacy was returned, as well as the weight justly due to settlements reported by Commissioners of the Mercer Circuit Court, and which have remained so long without objection, require that those settlements should be regarded as *prima facie* evidence of their own correctness, subject only to be impeached by surcharge or falsification, as in other cases of *exparte* settlements made under the sanction of a Court. Under the application of this principle, we should not

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MARDIN & WIFE et al. vs T. SMITH'S EX'R. &c.

feel authorized, upon the evidence in this case, to reject from the settlements and reports remaining in that Court, any item the propriety of which depends upon extraneous proof or matter of fact. But there is a palpable mistake of $100 in the addition, the correction of which would reduce the reported balance to $1,124, in which is included about $119 of interest on previous balances, the reduction of which balances would also reduce this item of interest. And the accounts must be subject to the correction of obvious mistakes, and to the addition of omitted items, in any appropriate proceeding, when it is material to ascertain the true amount of the estate of G. Smith remaining to be distributed, or to ascertain the justice of the balance shown by the settlements.

[Here the Court enter into a calculation of the state of the account prior to 1830, resulting in the conclusion, that no such balance as was charged by the committee was due to him. The Court proceed:]

Having thus disposed of the case so far as the accounts prior to the settlement of 1830 are concerned, by considering the committee as chargeable with the value of the personalty and the amount due on B. I. Head's notes, which became his, the proper demand of the administrator of G. Smith is to be ascertained from the accounts subsequently arising. In this part of the case the annual reports of the committee, stating his claim for services and disbursements up to April in each year, including 1841, in which he died, and charging himself with hire received or due for each year, up to the first of January, except for the four slaves which he had appropriated, should be assumed as the basis for making up the account, which should be done by striking a balance on the account of each year, as rendered by him, charging interest on the balances against him, crediting each balance in his favor at its date, first upon the interest and then upon the principal, and bringing down the interest without compounding it, to the date of the final settlement or the decree, when the principal and interest should be added together, as forming one principal element of the decree.

Charlotte, one of the four slaves appropriated by the committee to himself in 1830, having been sold himby

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in 1833, the committee should be charged with her hire as estimated in the Commissioner's report in this case, for the years 1830, 1831 and 1832, without interest, and also with the sum for which she was sold, say $350, with interest thereon from the first day of January, 1833, to the final settlement or decree. He should also be charged with the hire of the three boys, Ben, Jack and Stephen, as estimated by the Master Commissioner, from the first of January, 1830, up to the commencement of the action of detinue in which they were recovered, but without including interest; and the aggregate of these several charges will form a second principal element of the decree, to which should be added the hire of the boy West, for the year 1839, and of the boy Albert or Alfred, for the year 1841, as charged in the decree now before us.

As an ejectment has been brought by the heirs of George Smith, to recover the land which had belonged to him, in which the validity of the purchase by Turner Smith, his committee, will be or has been appropriately tried, the question of rents subsequent to the purchase, or to the first day of January, 1829, being involved in the issue of that suit, are not to be considered in making up the decree in this case, unless by consent of parties or by the determination of the ejectment suit, they should become proper subjects of account between the present parties. If the title did not pass by the sale, the administrator will be entitled to the annual value of the rents during the life of George Smith, which should go first to extinguish the interest and principal of the debt paid by the sale, and the aggregate of the remaining rents, without including interest, should form an element of the decree in favor of the administrator of George Smith. Should the ejectment not be determined, the bill as to the rents now referred to, may be dismissed without prejudice.

The sums which, upon the foregoing principles may be found chargeable against the estate of Turner Smith should be credited by the principal and interest of the notes of the Randell's, given for hire, but which have proved unavailable without the fault of the committee, and also by the amount of the judgments against the

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HARDIN & WIFE *et al.* *vs* T. SMITH'S EX'R. &c.

complainant, which he prays to be set off. In regard to these last particulars, the decree as rendered is proper; but we are of opinion that the charge of $100 for trouble and expenses incurred by McKitrick and wife in recovering the slave, Jackson, who had run away while the action of detinue, in which he and the two others were recovered, was pending, should not have been allowed. The slaves of G. Smith, except the four which had been appropriated by the committee, seem to have been delivered up to the administrator of G. Smith, and their hire alone is involved in this suit.

The heir or administrator of the committee of a lunatic may be sued in any circuit in which he may be found by the adm'r. of the lunatic or heir, and the jurisdiction is not confined to the circuit where the custody of the lunatic belonged.

Upon the re-argument of this case, allowed in consequence of the recent change in the composition of the Court, and since the foregoing opinion was prepared, the objection has been for the first time made in behalf of the executors of Turner Smith, that as the proceedings in chancery under which the accounts and other matters now in litigation arose, took place in the Mercer Circuit Court, the Washington Circuit Court had no jurisdiction to entertain the bill or grant the relief which he asks. But all the parties to this suit resided in the county of Washington. The Circuit Court of that county, therefore, had jurisdiction of the persons of the defendants, and as a Court of equity it had general cognizance of trusts and accounts, and also of lunatics within its territorial jurisdiction, and was in all respects as competent to determine the matters in controversy as any other Court of Chancery. And although during the life of the lunatic and his committee, while both were under the peculiar superintendance of the Mercer Circuit Court, that Court may have had peculiar or exclusive jurisdiction of all matters between them, affecting the estate and rights of the lunatic, or the rights and duties of the committee as such; yet, as by the death of both, this peculiar superintendance has ceased, and as by the grant of administration the estate of the lunatic has passed absolutely to an administrator appointed by another jurisdiction, we do not perceive any sufficient reason why the administrator may not sue for the estate of his intestate in the hands of the personal representative of the committee in the county of Washington, or in any other in

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which she may be found. We understand that all credits and allowances claimed by the committee or for him, up to the time of his death, have in fact been granted, and nothing in that respect remains to be done by the Mercer Circuit Court. Whatever of the estate of the lunatic which had come to the hands of the committee, was left after the deduction of these credits and allowances, belongs to the administrator of the lunatic, and is wrongfully withheld by the executors of the committee. If it consisted of a visible chattel, might it not be demanded by suit wherever it was found, and if in the hands of the executors, must they have been brought before the Chancellor in Mercer? The recovery of the three slaves in the action of detinue, is an answer to that question. Why then must a resort be had to that Chancellor for a money demand? The money belongs to the administrator as much as the slaves did, but being invisible, or resting in accounts, it is in fact undistinguishable from the estate of T. Smith in the hands of his executors. Does the fact that it is thus involved in uncertainty, and mixed up with the committee's own estate, give his executors a peculiar privilege to be sued in the Mercer Circuit Court, when they are not within its territorial jurisdiction? There is no denial that the administrator is entitled to so much of George Smith's estate as is in their hands. The only question is as to the amount. If that were ascertained, it could not be denied that the administrator, to whom it belongs, might recover it wherever he could find the persons who are liable for it. Why then, and how far is the Mercer Circuit Court peculiarly or exclusively competent to ascertain this amount? We say the peculiar and exclusive power of that Court was exhausted by its acts, or has passed from it by the termination of the proceedings in chancery and the death of the parties. It can no longer compel the committee to make more perfect disclosure of the estate, or control his management of it; and it is no more competent than any other Court of equity, either to ascertain by comparison of his reports and settlements, the proper balance of those accounts, or to ascertain by scrutinizing them or comparing them with extrinsic facts, whether any, and what

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HARDIN & WIFE *et al.* *vs* T. SMITH'S EX'R. &C.

items of the lunatic's estate were omitted. The fact that it might in Turner Smith's life have held him to a stricter account, and made fuller investigation, but did not, can neither exempt his estate from its just liability, nor preclude another Court from ascertaining and enforcing it. All that is due to that Court is, that in investigating the extent of T. Smith's liability, due respect shall be paid to its acts, as the acts of a tribunal having at the time, the exclusive superintendence of the lunatic and the committee, in reference to the management of his person and estate. Its acts within its legitimate powers, are so far as they are conclusive in their character, entitled to a conclusive effect, and have received it in the foregoing opinion. And to the allowances to the committee, which are virtual dispositions of the lunatic's estate, we have given the like effect. The settlements were expressly left subject to future investigation, and the annual reports of the committee are but impliedly approved. We have disturbed no item of debit or credit in either, but have only ascertained that certain items of charge were not included. We did what might perhaps have been in itself a sufficient answer to the objection, that as the Washington Circuit Court had jurisdiction of the person, and also of the general subject, the failure to make in that Court, and in due time, the objection of a special jurisdiction in another tribunal, if it could then have been made with effect, should be regarded as a waiver of it, and precluding it in this Court, and especially after it had been assigned for error by the objecting party, that the Washington Circuit Court should have *confirmed* all that had been done in the Mercer Circuit Court, or under its sanction. This opinion has in effect confirmed all that was actually done by the Mercer Circuit Court.

The acts of a Court of competent jurisdiction, so far as they purport to be conclusive between the parties, are entitled to a conclusive effect.

Wherefore, the decree, except as to the dissolution of the injunction against the judgment for hire, is reversed upon the cross errors of G. Smith's administrators, and the cause is remanded, with directions to have the account stated between the parties according to the principles of this opinion, commencing with the year 1830. And for a decree in favor of the complainant for the bal-

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ance which may appear to be due, subject to the credits above mentioned, and with the effect of vesting in T. Smith's executors the demand on B. I. Head's estate, and of vesting in the complainant the notes of the Randells. So much of the decree as dissolves the injunction against the judgment for hire in the action of detinue, is affirmed.

C. A. Wickliffe for Hardin and wife; *B. Hardin* and *B. & A. Monroe* for T. Smith's executors; *Harlan & Craddock* and *McHenry* for Geo. Smith's adm'rs.

Vanarsdall *vs* Fauntleroy's Heirs.

EJECTMENT.

ERROR TO THE GARRARD CIRCUIT.

Case 106.

Husband and wife. Tenancy by courtesy.

July 14.

JUDGE SIMPSON delivered the opinion of the Court.

The answers.

AN action of ejectment having been brought against the plaintiff in error, by the children and heirs at law of Margaret Fauntleroy, deceased, in the lifetime of their father, John Fauntleroy, for land sold by him during coverture, and which the tenant in possession held and claimed under a deed made by him and his wife, Margaret, but which, on account of a defect in the authentication, did not pass her title, it becomes material to determine, whether the husband's interest in the land continued during his life, as tenant by the curtesy, or ceased and terminated on the death of the wife.

The only evidence in the record material to the determination of this question is, that Fauntleroy and wife were married before the year 1803, that, in that year they made the deed of conveyance above mentioned, to the land in controversy; that the lessors of the plaintiff are their children; that Mrs. Fauntlery died in the year 1841; that Fauntleroy was never in the actual possession of the land so far as the witnesses knew, and that the land, when sold, was in the woods and unenclosed, but had been under fence and a part of it in cultivation for ten years last past, or upwards.

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VANARSDALL vs FAUNTLEROY'S HEIRS.

Actual possession by the husband, of the lands of the wife at the time of or during the coverture, is in general necessary to constitute the husband a tenant by the curtesy after her death.

An actual possession of the land of the wife, at the time of, or during coverture, is in general, necessary, to constitute the husband tenant by the curtesy after her death. Whether, where her lands are wild and uncultivated, and not adversely occupied, and remain in that condition during the whole period of coverture, the general rule requiring actual seizen would not apply, as was decided by the Supreme Court, (1 *Peters*, 507,) and in the State of New York, (8 *Johnson's Rep.* 271,) we do not deem it necessary now to determine.

If an entry is made upon the lands of the wife by the husband, or by another by his authority, or a vendee immediate or remote, his right as tenant by the curtesy is thereby consummated.

If the husband were to lease the lands of the wife, and possession was taken by the tenant, it would be virtually the possession of the husband, and sufficient, so far as seizen was necessary, to enable him to hold as tenant by the curtesy. If an entry be made upon the lands of the wife, either by the husband himself, or by any other person under him, and by his authority, the same effect is produced, and his right to hold as tenant by the curtesy, is consummated. Where a sale is made by the husband, and his immediate or remote vendee takes possession of the land under the purchase, it is done by the authority of the husband, it perfects his title as tenant by the curtesy, and the vendee has a right to the land during the lifetime of the husband. The possession of the vendee under such circumstances, is not adverse to, but consistent with the title of the wife. It would, so far as adverse titles were concerned, enure to her benefit, after the death of her husband, and strengthen her title fully as much as if the possession had been held by the husband himself. One of the reasons that exists at common law for requiring actual seizen of the lands by the husband during coverture, is to enable the heir to take the estate after the death of the wife, by descent from her; to do which, as he must derive his title from the person last actually seized of the inheritance, he is compelled to show an actual seizen on the part of the wife, which the law makes it the duty of the husband to acquire; the possession of the husband being regarded as the possession of the wife. This reason, however, does not exist in this country under our law of descents. The chief reason why the husband is here required to take the lands of the wife into

The possession of vendee of tenant by the curtesy, immediate or remote, is not adverse but consistent with the title of the wife or her heirs.

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actual possession, is to strengthen her title to, and protect them from adversary claims, and from a hostile possession which might, by its continuance, endanger her right; all of which is as fully accomplished by the possession taken of them by the husband's vendee, as it would be by a possession taken and held by the husband himself.

It follows, therefore, that according to the facts proved, John Fauntleroy was tenant by the curtesy, of the land sued for, and that when this action of ejectment was brought, the lessors of the plaintiffs had no right to the possession of it. The verdict of the jury in favor of the plaintiffs, was consequently unauthorized, and the defendant's motion for a new trial ought to have been sustained.

The instructions asked for by the defendant, based upon a supposed adverse holding, were properly overruled. The attitude of the parties precluded the defendant from relying upon a defence of that kind.

But for the failure to sustain the defendant's motion for a new trial, the judgment must be reversed, and cause remanded with directions to award a new trial, and for further proceedings consistent with this opinion.

Harlan & Craddock for plaintiff; *Bradley* for defendants.

Graham's Ex'r., &c. *vs* Sam and others, (persons of color.)

CHANCERY.

APPEAL FROM THE TODD CIRCUIT.

Case 107.

Wills. Emancipation. Slaves. Dower.

JUDGE BRECK delivered the opinion of the Court.

July 16.

Case stated.

THIS bill in chancery was exhibited by Sam and fourteen others, persons of color, some of whom were infants, and sued by Sam as their next friend, against the executor, devisees and heirs, and widow of John Graham, deceased, claiming the benefit of the provision

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GRAHAM'S EX'R. vs SAM *et al.*

made for them by said Graham, their former master, in his last will.

The clause of the will to be construed.

The will contains the following clause, viz: "Lastly, I will that my negroes should go to Liberia, and for that purpose I now give them dispensation of ten years, viz: until the 1st January, 1850, during which time they will be hired out annually, by my executor, but not to the highest bidder; the proceeds of said hire kept as a separate fund. Now should any or all of those slaves become willing and give themselves up to embark for Liberia, I do hereby emancipate all such for that purpose. That each grown emigrant be furnished with a decent suit of clothing and one hundred dollars cash, as an outfit, to be furnished out of the proceeds of the hires above kept as a separate fund for the purpose, if need should so require, if otherwise, at the expiration of the ten years as above, on the 1st day of January, 1850, it is my will that they be equally divided amongst all my grand children by valuation, then living."

The complainants alledge that they elect to go to Liberia, and give themselves up for that purpose, and pray that the Chancellor will cause the provisions in the will for their benefit to be enforced and carried out according to the benevolent intention of the testator.

The defendants resisted upon various grounds, the relief sought.

Decree of the Circuit Court.

The Court below decreed that the complainants should be permitted to depart immediately, or as soon as might be practicable, for Liberia, and that neither the executor or others should interpose any obstacle to prevent their emigration to that country; that the executor should pay to each of the grown complainants, one hundred dollars, and furnish them with clothing as directed by the will. The Court further decreed that the complainants were entitled to their hire subsequent to the exhibition of their bill, and their election therein to embark for Liberia, and directed the same to be paid over to them; and that out of this fund the young as well as the old, should be properly and amply furnished with clothing for their removal.

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From that decree the defendants have appealed to this Court.

Various questions are presented by the assignment of errors—and,

Errors assigned; want of jurisdiction.

1st. As to the jurisdiction. That a Court of equity has jurisdiction and ample power, upon the refusal or failure of the executor, as in this case, to execute the will, according to its proper construction, it seems to us there can be no doubt.

The Chancellor has jurisdiction to decree a specific performance of a will directing slaves to be sent to Liberia on their electing to go.

It is one of those cases in which it is the peculiar province of the Chancellor to interpose, and who alone could grant the relief to which the complainants were entitled.

The complainants, upon application to Court, were permitted, and very properly, to sue in *forma pauperis*. The objection to the jurisdiction and form of proceeding is deemed wholly untenable.

The testator provided that if any of his slaves should become willing, and give themselves up to embark for Liberia, that "*he thereby emancipates all such.*" Held that upon any one of the slaves electing to go, and embarking for Liberia, that the emancipation of such slave had relation back to the death of the testator and that issue born after the testator's death, of such slave would also be free.

2d. It is insisted that the Court erred in the construction of the will. The Court decided, and we think correctly, that it was not the intention of the testator that the complainants should wait till the expiration of ten years before they could exercise the privilege of electing and surrendering themselves up to embark for Liberia. It is manifest, in our opinion, that he intended to give them the privilege to elect, at any time during the ten years, and that the privilege should continue until the expiration of that period, and then cease. In the first part of the clause, he expresses his desire that his negroes should go to Liberia; and afterwards provides that should any or all of them become willing and give themselves up to embark, that he thereby *emancipates* all such for that purpose. Upon their making the election and actually embarking, their emancipation should be regarded as having relation back to the death of the testator.

This construction, which we think is very clearly authorized, obviates the objection that some of the complainants have been born since the death of the testator. If the freedom of the mother, upon her election and embarkation, relates back to the death of the testator, it would follow, of course, that the child would be free, and ought, not only in view of the clearly presumed intention of the testator, but in obedience to the dictates

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GRAHAM'S EX'R. vs SAM *et al.*

of humanity, to be considered as embraced by the provision and to follow the destiny of the mother.

It is evident the testator intended that infants as well as adults, should enjoy the benefit of the provision. It was his will that all should go to Liberia, and we think the Court below was right, if the children were too young to exercise the privilege of election, in permitting the parents to do it for them, and more especially as the election was such as the Chancellor would approve.

3d. It is contended that the right of dower of the widow of the testator in his slaves, was not affected by the will, as she renounced its provisions, and several of the complainants were allotted to her as dower, by order of the County Court. The Court below very properly, we think, disregarded that allottment, and the claim set up by the widow.

The husband has the right to emancipate his slaves irrespective of the widow's right of dower, and the renunciation by the widow of the provisions of the will of her husband, cannot impair the right of slaves emancipated to their freedom. (1 *Dana*, 48.)

The right of emancipating by will, is given by statute, untrammelled by any reservation or restriction as to the widow's right of dower. In *Lee* vs *Lee's executors, &c.*, (1 *Dana*, 48,) this Court so decide, and that the widow is not entitled to dower in the slaves of her husband, emancipated by his last will and testament.

But it is urged the emancipation in this case is conditional, and consequently that the question settled in the case referred to, is not applicable and certainly not conclusive.

It is true the emancipation in this case is made to turn upon the contingency of the complainants' being willing to embark for Liberia. In that event the testator says: *I hereby emancipate them for that purpose.* There is nothing prohibitory in the statute, and no valid objection upon any ground, is perceived against this conditional emancipation. We think it is valid under the statute, and consequently that the widow can interpose no right of dower as an obstacle to the execution of the will in that respect.

Slaves by the will were to be free upon surrendering themselves up to embark for Liberia,

4th. It is objected that the Court erred in decreeing a hundred dollars to be paid over to each of the grown complainants, and that the hire of the complainants subsequent to the exhibition of their bill, should also be paid over to them. This objection is deemed valid. It was

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not, we think, the intention of the testator that his slaves should be emancipated, unless they actually embarked for Liberia. It is true he says: Should they become willing, and give themselves up to embark, I hereby emancipate all such for that purpose. But he evidently intended when they made their election, that suitable steps were to be taken for sending them to the place of destination. We cannot presume that it was his intention to leave the consummation of his purpose in the discretion, and indeed at the option of the complainants. The Court, therefore, if the executor under the circumstances was not deemed a suitable person, should have appointed some other person as an agent or commissioner, to make suitable arrangements for the complainants for sending them to Liberia, The funds which the complainants were entitled to, should have been directed to be paid over to such agent, with directions, after furnishing the necessary supplies for their emigration, to pay it over to them upon their embarkation. Bond and surety from such commissioner, for the faithful performance of the duties which the Court from time to time might enjoin upon him, should be required. The Court should retain the control of the whole case till the devise in regard to the complainants was fully enforced.

and to receive $100 each. The Court should appoint a comm'r. to superintend the preparation to embark after election, and to pay over the money upon embarking, if the executor be not a suitable person to do so.

Should a proper opportunity for conveying the complainants to Liberia not immediately occur, the Court should retain control over them, and have them hired out, and proper care taken of them till such opportunity should be presented. The complainants would of course be entited to their hire.

The decree, we think, in regard to the funds and provision to which the complainants are entitled, is right. We are not satisfied that they were entitled to any more of their hire prior to the exhibition of their bill, than was decreed to them. We are, however, of opinion that the personal services and expenses of the commissioner who may be appointed, should be paid out of that fund, and also the necessary expenses in taking the complainants to the port of embarkation for Liberia. That these expenses should be defrayed out of the remaining portion of that fund, after paying the several sums as directed in

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CHISHOLM'S H'S. vs BEN et al.

the decree. It seems to us that the expenses thus directed to be paid, are necessarily incident to the due execution of the will. The question presented by the cross error in regard to the hire of the complainants, prior to the exhibition of their bill, has already been disposed of.

The decree is right so far as it regulates the payment of costs.

The decree, for the errors indicated, is reversed, and the cause remanded for further decree and proceedings consistent with this opinion.

Hise for appellants; *Underwood and Bristow* for appellees.

CHANCERY. **Chisholm's Heirs *vs* Ben, Celia, &c. (persons of color.)**

Case 108.

ERROR TO THE GREEN CIRCUIT.

Wills. Evidence. Revocation of wills.

July 19. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated. THE County Court of Green county having rejected, as not sufficiently proved, a paper offered for probate as containing the substance of the will of Benjamin Chisholm, the case was taken by appeal, into the Circuit Court for the same county, where the judgment of the County Court was reversed, and a provision giving to Mrs. Chisholm for her life, the tract of land on which Chisholm had lived, and also six slaves, Ben, Celia and others, and emancipating them at her death, was ordered to be recorded as the will of said Chisholm. To reverse this judgment the heirs of Chisholm prosecute this writ of error.

To prove a will not in existence, it must appear, 1st. That a valid will was made, 2d. The contents or such part as may be recorded.

No written will having been produced for probate, and none having been in existance at the death of Chisholm, it was incumbent on the party offering to prove by parol, the substance of his will, to establish: 1st, The fact that he had made a valid will. 2d, The contents or substance of that will, or of such portion as might be re-

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corded as his will; and, 3d, That the will, though not in existance at his death, had not been revoked by him.

3. That though not existing at the testator's death, had not been revoked.

I. Upon the first of these propositions, the proof, by two subscribing witnesses, that they, at the request of Chisholm, on different occasions, and each when the other was not present, subscribed a paper acknowledged by him to be his will, might be deemed sufficient to raise the presumption that the instrument had then the signature of the testator, were it not that the witnesses not only did not see the signature, but the circumstances tend to the inference that if there had been a signature at the bottom, it would have been seen; and as one of the subscribing witnesses says the will was read to him by Chisholm on the occasion when he subscribed, his failure to state that it had the name at the commencement or elsewhere, has some tendency also to repel that assumption. It is true, a female witness, whose character for truth as well as chastity, is impeached by several witnesses, and sustained by none, after having sworn in a deposition in reference to this alledged will, that she had heard Chisholm read no part of it, stated in her oral testimony in Court, that she had heard him read it all, and that it commenced in the usual way, "I, Benjamin Chisholm," &c. But we reject the testimony of this witness, as being discredited, not merely by bad character but by her own contradiction upon a material point affecting directly her evidence as to what was in the will, and by other circumstances not necessary to detail.

Evidence examined upon the due execution of the will.

There is no other testimony bearing directly on the question of signature. But it appears that about two years before his death, which was probably after the subscription of the names of the two witnesses, Chisholm deposited with a friend, (Vancleave,) a sealed paper, which he said was his will, and to be preserved as such, and he repeatedly said, within the last two years of his life, that he had a will. The question, however, is not whether the instrument was in due form when it was deposited with Vancleave, which, however, is itself only matter of inference, but whether it had the signature of Chisholm when it was subscribed by the witnesses. By the letter of the statute, the signature is an essential re-

By the letter of the statute, the signature is an essential requisite of a will of land or slaves, and it must be complete by signature when attested, *Swift* vs *Riley*, (1 *B. Monroe*, 116.)

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Chisholm's H's. vs Ben et al.

quisite of a will of land or slaves, and by its fair import, the instrument must be complete by signature at the time of attestation: *Swift* vs *Riley*, (1 *B. Monroe*, 116.) It is the due execution of the will that the witnesses are to attest, and by their subscription to authenticate. When the instrument produced is complete in form as a will, or if not being produced, it has been seen with the signature of the decedent, then the proof by the subscribing witnesses, that they subscribed upon his acknowledgement, though without seeing the signature, together with proof identifying the instrument subscribed as the one seen in perfect form, or in case of a lost will, the proof by the subscribing witnesses of acknowledgment alone, might be sufficient in the absence of countervailing circumstances, to prove the due execution of the will.

But although the mere fact of subscription by attesting witnesses, which is made essential by the statute as a means of authentication, might be deemed in itself, a sufficient ground in the absence of repellant circumstances, to authorize the presumption of all that was necessary to constitute a proper attestation and to justify the subscription as an act of authentication, it is a very different whether and how far other facts, such as the condition of the testator, as being childless or otherwise, his desire to accomplish a particular object by his will, his declarations and acts importing a belief that he had a will, facts to which the statute gives no importance, and which have only a general bearing upon the question of testacy or intestacy, should be entitlod to any effect upon the specific question of due execution of the will, for the proof of which the statute intends to provide, by the attestation of subscribing witnesses. There being, in this case, circumstances attending the fact of subscription by the witnesses, such as the concealment of the place of signature from the first subscribing witness after the testator had professed to make him acquainted with the contents of the will, and the failure of the other to see the signature of the testator, when, if it had been there, he would probably have seen it, and when he did see the name of the first witness, which tends to overthrow the presumption that they attested the due execution of the will, and

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to impair the effect of their subscription as proof of the fact; it is matter of great doubt involving a question of serious importance, whether the more general facts referred to, or any facts falling short of actual proof that the instrument was signed, can be brought in to supply the deficiency of the statutory evidence.

Is then the due execution of the will by the signature of the testator, which the statute requires to exist at the time of attestation by the witnesses, and which, in this case, they have not only failed to prove, but rather disprove, to be determined by inferences or by a comparison of probabilities, drawn from general facts of remote bearing, and which cannot possibly establish, with certainty, the existance of the signature at the time of attestation? Without attempting any peremptory solution of this important question, we will say that while in a clear case of spoliation, it might be allowable to solve all doubts and adopt every presumption against the spoliation, and while the fraudulent destruction of the certain means of proof which the instrument itself would afford of its own form and contents, might, to a considerable extent, supply the absence of other proof, it does not follow that the casual loss of a will should have the same effect in relaxing the rules of evidence, and much less that a will not produced, should be established upon doubtful inferences, as to its due execution and contents, if it be also doubtful whether it were revoked by the decedent or fraudulently destroyed by others. But conceding, (what is by no means certain,) that if the contents of the instrument now in question were satisfactorily proved, and if upon all the facts bearing upon the question of revocation, there was a reasonable certainty that the instrument never was revoked, and especially if there was a reasonable certainty that it had been fraudulently destroyed, the will should not be rejected solely on the doubt arising in the present case as to its due execution at the time of subscription by the witnesses; we cannot admit that there is such certainty on the question of due execution as would authorize any relaxation of proof on either of the other questions. And we leave the proof on the ques-

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Chisholm's H'rs. vs Ben et al.

tion of due execution, as rather requiring aid from the proof on the other questions than giving strength to it.

Evidence examined in regard to the contents of the will.

II. With regard to the contents of the will, there is, as already stated, no witness who assumes to have ever read a word of it, except the trifling bequest of the cupboard and its ware, after the death of Mrs. Chisholm, which the female witness before referred to says she read, and for the establishment of which there seems to be no effort nor care. The same witness says she heard Chisholm read the will as he wrote it, in the presence of herself and his wife, and undertakes to say that a draft of a complete will, exhibited on the trial in the Circuit Court, contains the provisions of the will as then read. It has already been stated that the same witness had previously sworn that she had not heard Chisholm read any part of the will. And besides this and other discrepancies between her different statements, there are circumstances not necessary to be now detailed, which render it improbable that the will was, in fact, read to Mrs. Chisholm and the witness, as she says. We, therefore, lay her testimony out of the case on the question of the contents, as we did on the question of the execution of the will, with the remark that the obvious attempt, by means of this witness, to fabricate testimony of facts which she did not know, illustrates the weakness of the case on the part of the propounders of the will, and the caution with which parol testimony of the contents of a will should be received.

The only remaining witness who pretends to any knowledge of the actual contents of the will, is the first subscribing witness, who says Chisholm read or professed to read it to him when he called on him to witness it. But while this is represented as having been done by Chisholm, even without any request on the part of this witness, the second subscribing witness states that he asked to know what was in the will, and was answered that it was not necessary for him to know its contents, and they were neither communicated to him, nor to the confidential friend who is said to have been named as executor, and with whom the paper was deposited. Nor is there any circumstance in the case which accounts for or explains this signal and exclusive confidence said to have

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been reposed in this first subscribing witness, who appears to have been comparatively a young man, and although in the employ of Chisholm, is not shown to have held any peculiar place in his esteem, and whose character, although not overthrown by the testimony, is not above reproach. Nor are there wanting some discrepancies between his written and oral testimony, which tend to weaken his claims to absolute credence.

These considerations tend to throw some doubt even upon the statement of this witness, that Chisholm professed to read the will, or otherwise to communicate its contents to him; and when it is recollected that he would not allow the witness to read for himself, and even folded down or covered over the writing when the witness came to subscribe his name, it seems fairly inferable, that if Chisholm did profess to read the will to him, he did not really intend that he should know what it contained. But further than this, the witness states that Chisholm not only read but also talked of the contents of the will. He does not know that he read it all. He does not, in fact, know that he read any of it; and it is uncertain from his statement, what part he derived from the conversation and what part from the supposed reading of Chisholm.

Conceding then, that the evidence of this witness is worthy of full belief, is it sufficient to establish the contents of the will? Does he in fact know, or pretend to know what was in it? And does his testimony amount to any thing more than a detail of what Chisholm told him was in the will, or of what he supposed Chisholm was reading from the will? It is true, his statement that the will emancipated certain slaves, corresponds with the statement of other witnesses, that Chisholm had said to them that he intended to emancipate, and to some or all, that he had emancipated his slaves by will. But is not all this testimony of precisely the same grade and efficacy, all resting upon the mere statements or representations of Chisholm himself? And are these representations, if made to a hundred witnesses, and especially to witnesses who had no interest in the subject, and no right to require the information from him, sufficient of themselves to establish the contents of the will in the Court of Pro-

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CRISHOLM'S H'S. vs BEN et al.

bate. If the due execution of the will is to be proved by the acknowledgment of the decedent, without an exhibition of his signature, that a certain paper is his will, and if the contents of the paper, in case of its absence, are to be proved by evidence of his own statements of what was in it, the statutory requisitions of writing, and signature, and attestation by subscribing witnesses, would seem to be of little value, since the whole proof of the will would in effect be made by evidence of the mere statements of the decedent himself. There is little difference between setting up a lost or absent will upon the testimony of witnesses who say they subscribed a paper upon the acknowledgment of the decedent that it was his will, without seeing his signature, or reading or perhaps seeing what was written, with additional proof by themselves or others, that the decedent said his will contained such provisions, and setting it up on no other proof than that of divers credible witnesses, that they had heard the decedent say he had a will in his desk containing such and such devises.

The declarations of a decedent tending to show that his will was still in existence though rejected by the New York Courts to repel a presumption of revocation, are admitted in Ky. and elsewhere, though with caution, and only as corroborative, & regarded as the lowest species of evidece.

In the Courts of New York, declarations of a decedent, tending to show that his will once duly executed was still in existence, have been rejected as incompetent to repel the presumption of revocation: *Jackson* vs *Betts*, (6 *Cowan's Rep.* 382,) and cases there cited. And although such declarations are freely admitted in this and many other Courts, upon the question of revocation, or upon the general question of testacy or intestacy, they are received with caution, and apparently as corroborative only, even upon that question, being as said by Sir John Nicholl, in *Johnston* vs *Johnston*. (1 *Eng. Ecclesiastical Reports*, 144,) in general the lowest species of evidence, though received as corroborative in the Ecclesiastical Courts. Can such evidence then, be alone sufficient to establish in the Court of Probate, the contents of a will which the statute requires to be in writing? The statute contemplating the exhibition and proof of the written will itself, makes no provision for proof of its contents in case of loss or destruction. Under the various exigencies arising from casualty or fraud, a lower grade of evidence has been necessarily admitted, and there may

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probably be circumstances which would authorize the establishment of a will upon the mere weight of probability as to its execution and contents. But we are not prepared to admit that every point in the question of probate may be left to that determination. There must be reasonable certainty somewhere. And although in case of the non-production of the will, under circumstances which raise no presumption of unfairness on the part of those who would establish it, there must be a departure from the strict rule of evidence requiring the contents of a writing to be proved by itself, still the spirit of the statute, and the preservation of those barriers which it intends to erect against the fraudulent imposition of mere parol wills, as well as the fraudulent suppression of valid wills in writing, seem to determine in case of the mere loss of a will against the sufficiency of parol evidence of its contents, not derived from an inspection of the written will by the witness, or from its actual operation as allowed by those who are interested against it, and may be presumed to have had actual knowledge of its contents. These considerations disallow in the case supposed the sufficiency of the testator's mere declarations, either as to his general intentions, or as to the particular import or effect of his will. And if such declarations and other general circumstances more or less remote from the particular fact be allowed in case of fraudulent suppression of the will, to be sufficient proof of its contents, the same considerations seem to require that the fact of fraudulent suppression which is to authorize such extraordinary relaxation of the rules of evidence, should itself be established beyond reasonable doubt.

The contents of a lost will have never been established in cases where there was not a fraudulent destruction of the will, unless the witness had read the will and in that way had a knowledge of its contents. Can other proof be admitted in cases where the

The books of reports contain many cases in which wills lost or destroyed, have been offered for probate upon parol or other secondary evidence of their contents, and many in which such wills were established. But in an examination of these cases as extensively as opportunity would allow, we have found none in which there does not seem to have been the evidence of witnesses who knew, or might be presumed to have known the contents of the will, from their own inspection; none in which the declarations or even professed reading of the decedent

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CHISHOLM'S H'R. vs BEN *et al.*

fraud is of doubtful inference?—QUR.

have been held to be alone sufficient on this point, and none which would sanction their admission upon the question of the contents of the will, with any other effect than as merely corroborative of the more direct evidence. The cases of *Trevelyan* vs *Trevelyan*, (1 *Eng. Ecc. Rep.* 64;) *Davis* vs *Davis*, (2 *Ib.* 277;) *the case of Harper's will*, (4 *Bibb*, 244;) *Beauchamp's will*, (4 *Monroe*, 362;) *Payne's will*, (4 *Monroe*, 424;) *Baker* vs *Dobyns*, (4 *Dana*, 220;) *Allison* vs *Allison*, (7 *Dana*, 90;) *Beall* vs *Cunningham*, (3 *B. Monroe*, 390;) *Campbell* vs *West*, (3 *Ib.* 242;) *and Steele* vs *Price*, (5 *Ib.* 58,) and others have been examined, and although some of them indicate a strong presumption of fraud in the suppression of the will, not one of them seems to have been determined on such evidence of the contents of the will as is now in question. But in the case of *Steele* vs *Price*, (5 *B. Monroe*, 58,) which was the case of a will casually lost by the testator, the devise of the slaves as established, was expressly restricted to include those only whose names were stated by the witnesses from an inspection of the will.

If the fraudulent destruction of a will for the purpose of producing intestacy, is to have the effect of authorizing a departure from the rule thus intimated in *Steele* vs *Price*, and of throwing open the proof of the execution and contents of the will, or of its contents alone, to every description of evidence which may be calculated to raise an inference, and is to authorize the establishment of what, upon comparison of inferences, may be supposed to have been the probable contents of the will, we repeat, the fact which is to authorize such a relaxation must itself, be placed beyond reasonable doubt. If there be not some stringency in the rule of proof, at least upon this point, if a doubtful inference of fraud is to authorize the establishment of a will by proof of the parol declarations of the testator, it may be made easier to prove an absent will than one which is actually produced; and an inducement and opportunity may be offered for setting up spurious wills, the prevention of which is no less the object of the statute and of the law, than is the frustration of the fraud which would suppress a valid will.

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III. Under the most liberal view then, of the law applicable to the proof of a will not in existance at the death of the supposed testator, the sufficiency of the evidence in this case, depends upon the effect of the proof relied on by the propounders of the will, to show satisfactorily, that it has not been revoked, but was fraudulently destroyed to prevent its taking effect as a will, and to the consideration of this point we now proceed.

Evidence examined as to the fraudulent destruction of the will and revocation by the testator—difficult to say that the preponderance is not in favor of the conclusion that the will was revoked.

The fact that the will was destroyed before the death of the testator, is sufficiently established, and no presumption arises in this case, that it was done by those who are now endeavoring to establish it. The effort on their part is to show that it was secretly and fraudulently destroyed by Mrs. Chisholm, who seems to have obtained it by a message in the name of her husband, to the person with whom it was deposited; and they attempt further to show that at the time when it was thus procured, and from that time until his death, he was in such a condition of mind as rendered him incompetent to revoke his will, even if it was destroyed with his knowledge or subsequent approbation, which they deny. That there is evidence conducing to prove all these facts, is not to be denied, although there is no direct testimony as to the circumstances immediately attending the destruction of the will, and the evidence of Chisholm's incompetency does not show it to have been continual. But giving to it the utmost reasonable effect, proves it to have been occasional only, with intervals not clearly defined by the evidence. On the other side, two visiting physicians prove that they saw him, two or three times, during the period referred to, when though lethargic, he was entirely rational when aroused by conversation; one of them thinks he was insane only with reference to his own health or disease. Other witnesses prove his participation in business transactions within this period, under circumstances that leave no doubt as to his competency. And while the sale of one of the slaves said to have been emancipated by the will, which constituted one of these transactions, proves conclusively a change of intention, and was a revocation as to that slave, several witnesses prove his declarations at several periods approaching within a few weeks of the

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CHISHOLM'S H'S. vs BEN *et al.*

time of his death, importing that he had destroyed his will and would die without one. Then although there appears at one time, about or near two years before his death, to have been some dissatisfaction on the part of Mrs. Chisholm, and a short separation between herself and husband in consequence of his having made or intended to make a will emancipating his slaves, there is no proof of the slightest contest or dispute between them after their reconciliation, which must have been long before the commencement of his sickness and alledged incompetency. And as her dissatisfaction seems to have arisen rather from his emancipation of one or two slaves which she claimed, than of his freeing the others, the presumption may be indulged that that matter was settled to their mutual satisfaction. Be this as it may, the will as established, gives to her for her life, the entire tract of land and all the slaves; and as this seems to place her in a much more favorable condition than if her husband had died intestate, she had no apparent motive of self interest, prompting her to the fraudulent destruction of her husband's will, if its substance has been truly proved. Nor is there any thing in her conduct, so far as proved, in relation to sending for the will or destroying it, that can authorize the inference that in destroying the will she acted without the authority of her husband or in opposition to his wish. She mentioned to a physician by his bedside, that he had made a will and wanted to send for and destroy it, and consulted him as to the propriety of doing it. That this conversation was in an under tone on her part, was not strange, but if she had formed the design of fraudulently destroying the will, it would have been strange that she should mention the subject to an indifferent and respectable individual, and especially by the bedside of her husband, and without requesting secrecy. Then the other physician states that Chisholm subsequently told him that he had made his will and left it with Mr. Vancleave, but had sent for and destroyed it, (or possibly that he would do so,) and leave the law to dispose of his estate. Another witness also proves his statement that he had destroyed his will. And if these witnesses do not misrepresent the statements and condi-

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tion of Chisholm, the destruction of the will was, in effect, his own act, done for the purpose of revocation. The witness who went for the will and delivered it to Mrs. Chisholm, says nothing in his testimony from which it should be inferred that there was any thing done against or without the consent of Chisholm. His different statements to the various witnesses, most of which he denies or explains, and the making of which would seem to be inconsistent with the secrecy and fraud imputed to the transaction, if they serve to impair his credit, do not establish any fraudulent act. And it is to be observed that his character for veracity, is sustained by several witnesses, and indeed by all who speak on the subject. There is also evidence of declarations by Chisholm, indicating that he supposed he had a will some short time before his death. But the witnesses who speak of them, generally make the impression that he may not then have been perfectly clear in his mental faculties. While the witnesses detailing the opposite declarations, make a different impression as to his mental condition at the time. We will not, however, pursue this branch of the subject, upon which it might have been sufficient, at once, to say that the evidence does not establish satisfactorily, the fraudulent or improper destruction of the will, and that it would be difficult to say that the preponderance is not in favor of a revocation by the decedent.

It follows, that in our opinion, the evidence on the whole case, is insufficient to establish any provision of the supposed will, as the valid will of Benjamin Chisholm; and as we perceive no error in the trial to the prejudice of the propounders of the will, no new trial is necessary, but we proceed to pronounce finally in the case.

Wherefore, the judgment of the Green Circuit Court, reversing that of the Green County Court, and ordering to record as the will of Benjamin Chisholm, the devise of his land and slaves as stated in said judgment, is reversed, and the cause is remanded with directions to affirm the judgment of said County Court.

Morehead & Reed for plaintiffs; *Robertson & McKee and Harlan & Craddock* for defendants.

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CHANCERY.

Case 109.

Paynter, &c. *vs* Evans.

ERROR TO THE GREENUP CIRCUIT.

Chancery jurisdiction.

July 19.

JUDGE BRECK delivered the opinion of the Court.

Where a defence is ample at law against a guarnishee, and he fails to make it without a valid reason; the Chancellor cannot relieve.

IT very satisfactorily appears that before Myers sued out his guarnishee warrant, Evans had assumed to pay Jesse Paynter what he owed David Paynter. Upon the trial, therefore, of that warrant, Evans should have plead and relied upon that fact, and if the defence had been improperly overruled by the Justice, he should have appealed. So also if the judgment upon the guarnishee warrant had been a good defence upon the trial of the warrant of Jesse Paynter, Evans should have plead and relied upon it, and if the decision of the Justice had been erroneous, have appealed from it.

Whether in point of fact, defence was made on the trial of either of the warrants, does not very clearly appear, nor is it material; if made, a Court of equity would not afterwards have jurisdiction. On the other hand, if no defence was attempted, no reason or cause is shown for the failure. So that in either view of the case, as defence before the Justice was ample, and should have been there made, the Court below had no jurisdiction.

It is true it is a hard case upon the complainant to have to pay the same debt twice, but this results from his own neglect and inattention, or from mistaken counsel, and the Chancellor cannot relieve him as to either judgment.

The decree must be reversed and the cause remanded, with directions to dismiss the complainant's bill and dissolve his injunction with damages and costs as to the defendant, Jesse Paynter, as well as to the defendant Myers.

Davis and Beatty for plaintiffs.

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Thompson *vs* Thompson's Ex'rs.

DETINUE.

ERROR TO THE HICKMAN CIRCUIT.

Case 110.

Detinue. Practice in suits at law.

JUDGE SIMPSON delivered the opinion of the Court.

July 19.

THIS is an action of detinue for a slave, alledged in the plaintiff's declaration to be of the value of four hundred dollars. The defendant, after the service of process, having made default, the Court, without the intervention of a jury, rendered a judgment for the slave, if to be had, if not, then for the sum of four hundred dollars, his value, as alledged in the plaintiff's declaration.

Case stated.

A default of the defendant in an action of detinue, admits the plaintiff's right of action to the property sued for, but not the value as stated, and a jury is necessary to inquire into, and assess the value, as well as the damages sustained by the plaintiff by reason of the detention. The defendant is materially interested in the value placed upon the slave. Notwithstanding he may discharge the judgment for the alternate value by a delivery of the slave, yet he may die or run away, or other unavoidable accidents may prevent his delivery, whereby the defendant becomes liable for the assessed value, whether it be or not the real value of the property sued for.

The default of the defendant in an action of detinue, admits the plaintiff's right in the property, but not the value alledged, and a jury is necessary to fix the value of the slave, and damages for detention before judgment.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

W. R. Beatty for plaintiff; *E. I. Bullock* for defendants.

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CHANCERY.

Case 111.

Meres *vs* Chrisman, &c.

APPEAL FROM THE FLEMING CIRCUIT.

Torts. Bills of discovery. Chancery jurisdiction.

July 19. JUDGE SIMPSON delivered the opinion of the Court.

Case stated. THIS is a suit in chancery brought by the plaintiff in error against Alexander and John Chrisman. The complainant alledges that the defendant Alexander, seduced and debauched his infant daughter, and after setting forth such facts as would entitle him to a recovery at law for the injury, charges that the defendant, to prevent him from suing him at law, and obtaining legal redress, had fraudulently sold and conveyed his property to his father and co-defendant, John Chrisman, and had absconded and left the State. He asked for, and obtained an attachment; and a demurrer having been filed to the bill, it was sustained, and the bill dismissed.

Decree of the Circuit Court. The decree of the Court dismissing the bill, is attempted to be sustained on two grounds.

1st. That as the commission of the offence charged subjected the defendant to a penal prosecution, he was not bound to answer to it.

And secondly, that a Court of chancery has no jurisdiction in cases of tort, and cannot take cognizance of such injuries, even where the defendant has left the State, so that process at law cannot be served upon him.

The first objection to this mode of proceeding is founded on a misconception of the nature of the rule in equity, which excuses a party from making a discovery that might subject him criminally. A party shall not protect himself against relief in a Court of equity, by alledging that if he answers the bill filed against him, he must subject himself to the consequences of a supposed crime or misdemeanor, though the Court will not force him by his own oath, to subject himself to punishment: (*Milford's Pleadings*, 256.) If the bill in such a case is merely a bill of discovery, a demurrer to it will lie. But if it be

A party shall not excuse himself from answering a bill in chancery, by suggesting that he must subject himself to a supposed crime or misdemeanor, though the Court will not subject him by his own oath to punishment: *Mitford's Plead.* 256. If such bill is filed merely for dis-

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filed for relief, although the defendant may decline to answer, or may demur to that part of it which requires a discovery, yet a general demurrer, that precludes relief as well as discovery, will not be sustained.

covery, a demurrer will lie; but if filed for relief, though deft. may decline to answer, or may demur to that part which requires a discovery; yet a general demurrer which precludes relief as well as discovery, will not be sustained.

But the second objection is a valid one, and fatal to the relief sought by the complainant. Our Acts of Assembly which authorize proceedings against absent and non-resident defendants, are confined to demands arising out of contracts. The jurisdiction of Courts of equity has not been extended to injuries in cases of tort. The Chancellor has no power in such cases to liquidate the damages. It is exclusively the province of the Courts at law, through the instrumentality of a jury, to determine the amount to which the plaintiff is entitled for such injuries. When the amount has been ascertained, and a judgment rendered for it, a Court of equity will lend its aid in removing obstacles in the way of its collection, and a suit in chancery may be instituted for that purpose. But the Chancellor has no jurisdiction in cases of tort, to give relief in damages for the injury, although the party aggrieved may not be able in consequence of the absence of the defendant from the State, to proceed at law and obtain a judgment.

The statutes of Ky. authorizing proceedings against absent defendants & non-residents, do not apply to cases of tort, but to cases arising out of contracts. Chancellor's jurisdiction does not extend to torts—he has no power to liquidate the damages.

It is true, that as the law stands, a party who has removed from the State, and has no place of residence in it, cannot be proceeded against at law for the purpose of enforcing his appearance, either by attachment or proclamation, which can only be resorted to upon the return of not found on a capias which has been previously issued; but if this be a defect in the law, and admitting that justice and expediency require that our citizens shall receive redress in our own Courts for injuries inflicted here, instead of being compelled to resort to the tribunals of another State to which the party has removed, it is with the Legislature alone to supply the remedy, it being the duty of the Judiciary to expound and enforce, and not to make the laws.

As the laws of Kentucky now stand, there is no mode of compelling an appearance by attachment or proclamation, of a non-resident to answer for a tort committed in this State.

Wherefore, the decree of the Circuit Court dismissing the bill, is affirmed.

Cord and Throop for appellant; *Meeker* for appellees.

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CHANCERY.

Case 112.

Mayhugh *vs* Mayhugh.

ERROR TO THE FLEMING CIRCUIT.

Alimony.

July 21. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated. STRANGERS as we are to these parties, except as they appear in the record before us, it is yet impossible to reflect upon their past and present condition, without feelings of deep regret. After a harmonious union of more than twenty years, from youth to advancing age, during which they have reaped in an increasing prosperity and respectability, the fruits of industry and good deportment, and in the midst of a numerous family of children, have enjoyed the happiness which flows from mutual kindness and respect, the scene is suddenly changed. Instead of peace, discord prevails. Distrust succeeds to confidence. Insult takes place of kindness. Strife, reaching even to violence occurs, and at length a separation ensues, and the wife appeals to the laws of the land to secure to her a support independant of the will of her husband. The only cause of this unfortunate state of things is to be found in the fact that the husband, after so long a period of undisturbed confidence in the fidelity of his wife, permitted a suspicion of her chastity, as groundless in any conduct of hers, as it would seem to have been painfully real on his part, to enter and engross his mind. He did not conceal his suspicions, nor reserve them for reasonable proof, nor make them the ground of serious admonition or remonstrance, nor yet did he pursue the course which entire conviction of their truth might have prompted, of leaving his wife or removing her from his home. He reproached her openly and habitually, in the presence of her children, whom he disclaimed as being his, and yielding to his passion, he seldom spoke to her except in the way of anger and insult. The wife seems not to have been of a temper to sink under such a course of provoking persecution, nor does it appear that she endeavored

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to soothe her husband or to allay his jealousy. Whether she always retorted when thus assailed by him, cannot be known, but it appears that she sometimes did. Mayhugh denies that he ever used personal violence as charged. But although we are of opinion that he never used such violence as indicated a design to injure her person, or such as occasioned apprehension of injury on her part, it is proved by two of his sons, that on different occasions, even after their verbal altercations had ceased for a considerable time, he would spit upon her and in her face; and after making all due allowance for any bias which these witnesses may have displayed or felt in favor of their mother, we cannot disbelieve the fact thus specifically stated by both. Nor can we omit to remark that it is not the least among the painful consequences of the state of things for which the father must be held responsible, since it has followed, step by step, in almost necessary succession, from his own unfounded jealousy, that the children of common parents have been thus brought to take sides with one against the other, and that the father should find it necessary to charge some of them with improper motives for their conduct in this contest, and to discredit their testimony, if not even to insinuate the charge of perjury.

While the growing discord between Mayhugh and his wife was progressing towards its consummation, the interferance of her relations in her behalf, besides embittering the feelings of her husband and tending to widen the breach between them, led to a quarrel and an assault upon him by her father, which terminated in the death of the latter, killed by Mayhugh in self defence. In consequence of this act, he seems to have thought, and the evidence tends to support the opinion, that he could not safely continue at his residence in Mason county, which was in the neighborhood of his wife's relations, who besides as he supposed, had aggravated their domestic differences. He, therefore, determined to remove to a farm which he owned in the county of Nicholas, and as preparatory thereto, rented out his home farm in Mason. This course rendered it necessary that his family should either accompany him or remove to some other home. And as

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MAYHUGH vs MAYHUGH.

his wife and children refused to go with him, a farm in the neighborhood, and near the relations of the wife, was rented by the oldest son, then an adult, to which Mrs. Mayhugh and her children, with a large portion of the household and kitchen furniture and a supply of the provisions on hand and farming utensils and stock, were removed by the wagons and servants of Mayhugh, who also sent with them a negro woman, still retained. He continued to make contributions towards their support until near the end of the year, when the credits which he had allowed to them in two stores, were stopped by his order, and Mrs. Mayhugh, with the family, having got back to the home farm, by renting from the tenant of Mayhugh, who at the time of separation had gone to his farm in Nicholas, Mrs. Mayhugh, at this juncture, filed her bill for alimony. Two questions of fact affecting the character of this separation, are left somewhat in doubt. The one being whether Mayhugh participated in the arrangement for renting the farm to which his family moved when he went to Nicholas county, the other whether he made any effort to prevail on his wife to accompany him, or even desired her to do so. We infer, however, that the arrangement alluded to, was made with his sanction and probably with the expectation, authorized impliedly at least, by him, that he would pay or aid in paying the rent, which however, we are not satisfied that he has done. It seems too, that he proposed that his wife should go to the Nicholas farm, but we are not satisfied that the proposal should not be understood rather as a license than as a solicitation or even request. From these and other circumstances attending the separation, the fair presumption is, that it took place by mutual consent, and that although not perhaps agreeable to either party, it was deemed expedient by both, and was doubtless thus assented to, under the mutual understanding that Mayhugh was to make the necessary contributions towards the support of his wife, and probably with the expectation on his part, that a re-union might take place before the end of the year. Indeed he seems to have visited the family during that period, and to have made various advances for them. He says that he countermanded the orders for

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supplying them on his credit as above stated, as a means of inducing his wife to consent to live with him and be supported at home, where he avows his willingness and anxious desire still to receive and support her and his children. But it is, perhaps, unfortunate that he did not resort to other means of inducing her to return, and address himself to her affections rather than to her necessities.

It is perhaps, also unfortunate that Mrs. Mayhugh did not accept the offer of her husband, cold though it may have been, and accompany him to Nicholas. It was not unreasonable that he should desire to leave a neighborhood where he conceived his person to be in danger, and with which perhaps, were associated the causes, however insufficient, of his jealousy. His farm in Nicholas, though not deemed altogether eligible, even by himself, as a residence for his family, would present itself at once, as in point of convenience, an eligible place of removal, at least for a time. The surrender of her objections in compliance with his convenience and with his right to determine the place of his family residence, the removal to a different situation, and a little patience and affection on the part of his wife, might perhaps, have obliterated his unjust suspicions, restored quiet to his own mind, and brought back peace and harmony to the family mansion. If with a reasonable prospect of attaining such a result, by removing with her husband, Mrs. Mayhugh, with the full opportunity for reflection which the occasion afforded, was willing rather to sacrifice this prospect than to yield her partiality for a residence in Mason, or her objections to a residence in Nicholas, we should deem her but little worthy, either of the character given to her by the witnesses, or of that aid for which she appeals to the law. If, as is contended, such were the motives for her perseverance in following her own will and resisting that of her husband, we should be disposed to characterize the separation as being rather an abandonment on her part than on the part of her husband.

But such a conclusion might be as unjust to her as it would be injurious. Without allowing too much weight to the feeling of resentment naturally produced by a

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MAYHUGH vs MAYHUGH.

course of conduct on the part of her husband, tending not only to provoke but to degrade her, there is no evidence of any act or assurance of his, on which she could have built a well founded expectation that she might not be subject to the same treatment in Nicholas, among strangers, as she had received in Mason, where she was known and respected. He had neither discarded his suspicions nor retracted his accusations. He had given no evidence of returning confidence and respect. But still nursing the jealousy which was the cause of all the evil, and with feelings exasperated rather than softened by the remaining sense of affection and duty towards his wife, he seems to have habitually preserved a reproachful and threatening silence or to have vented his bitterness in opprobious language or in more contemptuous acts. We cannot say that Mrs. Mayhugh had no reasonable ground to fear that a removal to Nicholas would produce no change. We cannot say that under the existing circumstances, she was imperatively bound in duty as a wife, to go with her husband among strangers, who would receive their impressions from him, and when if not despised abroad, she might at home, and without the support of friends, be reproached as an adultress, and spit upon and spurned as a guilty and degraded wife. If some wives would have encountered every risk in the hope of restoring peace and happiness, some others might have sunk, broken hearted, under the cruel conduct of the husband. Such instances furnish no practical standard for estimating in a Court of justice, either the rights or duties of wives. The criterion by which, in human tribunals, the conduct of human beings is to be estimated, should be formed not according to the rule either of ideal perfection or of occasional excellence, but according to that standard which, being attainable by the various classes to which it is to be applied, is sufficiently high to ensure the preservation and promotion of the morals and good order of society.

Ideal perfection is not the rule of decision in human tribunals; but the standard of excellence which is attainable by the various classes to which it may be applied.

If in view even of these principles as applicable to the case before us, we should not say that Mrs. Mayhugh was wholly blameless, either in her occasional retorts, under the provoking language and conduct of her husband, or

In arriving at a conclusion as to the degree of fault in contests between hus-

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in determining not to accompany him to Nicholas, we are still aware of the injustice of deciding upon the conduct of either party, in view only of detached portions of an entire transaction, and of the necessity in determining the merits of a domestic controversy such as is now before us, of regarding at each stage of the transaction which may be brought up for judgment, not merely the acts then done, but also the existing state of the controversy, the actual relations in which it has placed the parties, and the causes which have produced a state of things in which each claims to justify by the conduct of the other, and how the other acts, which abstractly considered, are obviously inconsistent with duty. When therefore, on looking to the origin and course of this unfortunate difference between parties who had long maintained in its true spirit, a union which should have lasted until death, we find the sole cause in the unfounded suspicions of the husband, and in his unjustifiable reproaches and aspersions of his wife, it would be withholding that indulgence which human laws owe to human infirmity, to say that the law requiring her under all circumstances, to pursue the course of obedience and affection, allowed of no excuse for the ebulitions of resentment on her part, under whatever provocation. And to say further, that as these inexcusable ebulitions on her part necessarily tended to widen the breach and to inflame the resentment of her husband, therefore she and not he should be held liable for scenes of altercation and violence, and ultimate separation which ensued, would not only evince an undue partiality to the stronger sex, but would pervert the authority given to the husband into a license for oppression, and the obedience imposed upon the wife, into a sentence of abject submission.

band and wife in order to determine the right of the wife to separate from the husband and claim alimony, the Court must look as well to the provocation on the one hand as the reciprocal duties of husband and wife, to each other on the other.

If Mrs. Mayhugh, though innocent, had by any impropriety or imprudence of conduct, given even slight cause for the suspicions or jealousy of her husband, it would have been difficult to excuse the omission of every reasonable effort on her part to soothe his excitement and remove its cause. But there is no pretence furnished, either in the pleadings or the proof, that there was in fact any such cause, either in any particular act, or in the

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MAYHUGH vs MAYHUGH.

general conduct of the wife. All the witnesses place her above suspicion. And her husband while in his answers he seems studiously to abstain from avowing a change in his opinion and from retracting his charges, does not insinuate that there was any ground for making them. We are compelled to the conclusion that his suspicions and jealousy, were the mere results of imagination, under the effects of some delusion or hallucination of mind, or under the effects of intoxication, to which there is some obscure allusion. And although it might have been the duty of the wife, under all circumstances, to bear patiently the charges, and to endeavor to remove the suspicions of her husband, groundless as they were, we cannot say that she did not forbear as long as forbearance was possible to her nature, or that her retaliatory language at length resorted to, was either wholly inexcusable under the circumstances, or that they formed a justification of the subsequent conduct of her husband, who was first guilty of the gross violation of marital duty, from which followed naturally, if not properly, all the consequences which actually characterize the case.

When the husband's conduct towards the wife is such an habitual course of persecution as to render the bands of matrimony a place of wretchedness & degradation, she may leave him and have alimony.

We are of opinion, therefore, that although Mrs. Mayhugh may not be blameless in every part of the controversy, she has not forfeited the rights of a wife, and is still entitled not only to a support from him, but to a return of his affection and confidence. And although we may think that some parts of her conduct during the progress of the controversy were unwise, and in that sense imprudent, yet we are of opinion that the history of the case as gathered from the testimony and adverted to in this opinion, is such as in the language used in *Finley* vs *Finley*, (9 *Dana*,) "shows such habitual persecution on the part of the husband, as to render the bonds of matrimony to a prudent woman, the bonds of wretchedness and oppression." Under this principle, she was entitled to alimony when she filed her bill. And we do not concur with the counsel, in the position so earnestly maintained, that the imperfect compromise which afterwards occurred, has essentially changed her rights. That arrangement was rather a compromise of the suit than of the difficulty which had produced the separation. And

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although it provided on the one side for a dismissal of the suit, it secured nothing more on the other than a contribution for one year to the support of the wife, leaving her future support either wholly unprovided for, or else to rest in the will of the husband or the coersion of the law; and what is still more to the purpose, not implying reconciliation, nor producing or providing for cohabitation. The salutary principle, that reconciliation and cohabitation should bar all further complaint for previous grievances, does not apply to the case. There was neither reconciliation nor cohabitation for the time being, nor even a definite agreement securing them in future. The promise or representation of Mayhugh, that he would in the course of the year purchase a farm in Bourbon, or elsewhere, that would be acceptable to his wife, though it was an acknowledgement of his obligation to support her, and evinced a disposition at the time to do it in a manner which would be agreeable to her, left him at liberty to do as he pleased on the subject, as he said afterwards he would do. And when within a few days he notified his wife and son to quit his Mason farm at the end of the year, for which he had agreed to settle the rent for them, it was but a prudent precaution on the part of Mrs. Mayhugh, to file her amended bill, repudiating her order to dismiss the suit, and praying that it might progress. He says in answer to the amended bill, that the notice to quit was intended merely to put it in his power to deliver possession of the Mason farm ,under a sale which would be necessary to enable him to purchase another as he had promised. But the amended bill did not prevent him from consummating his purpose, and he has never done it. And we have again to say, that it is perhaps unfortunate that he should have attempted to operate upon his wife by coersion rather than by means better suited to convince her of his affection and respect. This notice to quit, given without explanation, and under circumstances evincing neither affection nor confidence, implies that he felt bound by the compromise only so far as he had undertaken in writing to settle the year's rent, and would suffice, if there were nothing else, to prove that

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MAYHUGH vs MAYHUGH.

there was no reconciliation, no return of affection and confidence, no agreement or prospect of reunion.

The court should retain power to enlarge or diminish decrees for alimony, as the circumstances of the husband may indicate to be proper.

Under all the circumstances of the case, we are of opinion, that Mrs. Mayhugh was entitled to a decree for alimony to such an amount, as without being excessive, in view of her husband's resources, would yet insure her a comfortable support accordant with her position in society, and independently of her husband's will or discretion. And although the annual value of his estate is not clearly shown, and we were at first disposed to think the annuity of $300, decreed to the wife, in addition to the property sent with her on the separation, was probably too much, yet as two of the children whose tender age may require a mother's care, have by a revocable order of the Court, been left in her custody, and as the others appear to have chosen a residence with her, which has been allowed by the father, and the continuance of which will impose some burthen upon her, though the husband is not relieved from the duty of supporting them, and as the Court retains the power of changing the sum to be annually paid, and may and should exercise it not only in case of a change of circumstances, but even upon satisfactory proof that the amount is unreasonably oppressive upon the husband, we have concluded that there is no sufficient ground for disturbing the decree in this respect. We find an additional reason for permitting the disposition made by the Chancellor to stand, at least for the present, in the opinion that whenever the husband shall return to such a state of mind as will give reasonable promise of security and comfort in a re-union with him, he will probably have it in his power to relieve himself from the burthen imposed by the decree, and to re-assume the right of maintaining his family according to his own discretion. We are not satisfied that any circumstances as yet existing, would authorize a reduction of the alimony as a means of coercing the wife to a re-union.

Wherefore, the decree is affirmed.

Cord for plaintiff; *Beatty and Payne* for defendant.

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Pierce *vs* Pierce.

CHANCERY.

ERROR TO THE FLEMING CIRCUIT.

Case 113.

Femes covert. Trusts resulting. Settlements.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court—Judge BREEK dissenting.

July 17.

THOMAS NEWCOMB executed his bond to Jesse Pierce for the conveyance of 74 acres and 100 poles of land, at the price of $20 per acre, making $1,492 50, payable as follows: "one thousand dollars of the amount I present to my daughter, Jane Pierce," who was the wife of the obligee, the residue was made payable in three annual instalments, a deed to be made on the receipt of the last payment, and at the same time Pierce to give a receipt for the amount of $1,000, given to his wife. Before the payment of the last instalment of the purchase, T. Newcomb died, leaving the title of this land to descend to several heirs, of whom Mrs. Jane Pierce was one. A portion of the land, (40 acres,) was sold under a decree, for the unpaid part of the purchase money, and purchased by S. C. Pierce for less than $300; and the whole having been previously mortgaged by Jesse Pierce to the said S. C. Pierce, to secure a debt of near $600, a bill was filed for foreclosure and sale of so much of the land as had not been sold under the vendor's lien. In this bill the heirs of T. Newcomb being necessary parties, Mrs. Jane Pierce, by way of answer and cross bill, claims under the gift to her as contained on the face of the title bond, an interest in the land bearing the same proportion to the whole as $1,000 bears to the whole price—alledging that her husband has left her without means of support, and with several small children to maintain. This claim is resisted by the mortgagee on the ground that the sale of the land to Jesse Pierce, was without condition, &c. The Court decreed the remaining 34 acres and 100 poles to be conveyed to the use of Mrs. Jane Pierce for

Case stated.

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PIERCE
vs
PIERCE.

A father-in-law gave a bond to his son-in-law for the conveyance of a tract of land estimated to be worth $1,492 50, one thousand dollars of which was donated to the wife of the obligee, and $492 50 to be paid by the son-in-law; the $1,000 was receipted for expressly as a donation to the daughter, the father-in-law died, title to the land descended to the wife of the obligee and others, heirs of obligor, the daughter against the creditors of her husband, insisted on her right to a settlement out of the land to the extent of $1000, that part of the consideration donated to her by her father, as the father had treated that donation as advancement to her, and on that account given her less than his other children. Held that she had a right to the settlement at the hands of the Chancellor as against the creditors of the husband to that extent.

life, and her children afterwards, and a reversal of this decree is sought by the writ of error.

There seems to be no room for doubt, that T. Newcomb intended the sale and conveyance of the land to Jesse Pierce, to be an advancement to his daughter, Mrs. Pierce, to the extent of $1,000 of the price. She alledges in her cross bill, and it is rendered probable by the recital of the will, that in consequence of this advancement, nothing was given to her by will. Her whole patrimony then, and her only means beyond the labor of her hands, for the support of a helpless family, consists entirely in such interest as she may have, if any, in this land, or in the price, or in the bond for the conveyance of the title.

If her necessities could give title to the relief prayed for, there could be no denial of her claim. But strongly as these may appeal to the sympathies of the Chancellor, they furnish no ground for his action in her behalf, unless upon some interest of hers, which may be claimed by or through the husband. In this view it might be a question whether to the extent that the title has descended to her, she should be compelled to convey. If, however, her husband had in fact been a purchaser, by his own means, to the full extent of the contract price of the land, and had received a bond for title in the common form, making no reference to the wife, she would certainly have had no equity in, and none against the bond, and none prior to it which could affect either the legal title in the hands of her father, or the equitable title in the hands of her husband. And we doubt if the Chancellor should lay hold of the mere circumstance of the naked legal title having descended to her before the complete execution of the contract, to compel a provision. In the case supposed, her father could not have insisted upon a reservation in her favor, nor would the Chancellor have coerced it if a specific execution of the contract had been sought in his lifetime. And the title being subject to the same equity in the hands of his heirs, as in his, we do not perceive that the wife, though one of the heirs, would have any more equity to have a settlement, or to retain this title, than if it had been held by a stranger. The title is

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absolutely subject to the equities created and evidenced by the bond. And unless the wife has an equity in or under the bond itself, she has no equity to retain the title, even so far as it is in her by descent. We come then to the question whether, on the face of this bond, the wife has any equity; and as this question, under the view we have taken of it, is not affected by the fact that her father, the obligor, is dead, and a portion of the title is in her by descent from him, we shall consider it as if he were still living and the effort was to coerce the title from him to the husband or his assignees.

Would the wife, in such a case, be a necessary party? Would the Chancellor, upon her petition disclosing her necessities and asserting an interest in the bond, recognize and secure such interest? Or might her father resist a specific execution, unless in a mode which would secure to her the benefit of the $1,000, part of the consideration given to her, and therefore, paid by her as a part of the price of the land? To the extent of this portion of the consideration, does not the husband or his assignee claim through the wife, and is not their claim, therefore, subject to her equity to have a settlement, or to have that portion of the land for which she has paid, or to have her $1,000 raised out of the land?

Would not a father who gives his bond to convey to his son-in-law a tract of land in consideration of a donation of part of the price to his daughter, have a right to resist a specific execution unless the rights of the daughter to the extent of such part was secured to her, or if such a donation had been made to the grand daughter of the obligor? Held that he properly might resist for such purpose.

Suppose instead of presenting $1,000, part of the price to the vendor's daughter, he had presented the same sum, in the same terms, to a grand daughter, the child of Mrs. Pierce, and provided that upon payment of the residue by Pierce, a deed should be made, he receipting for the $1,000 given to his child; what should have been the form and effect of the receipt to be given on completing the payment and making the deed? Should it not have stated the fact that Pierce had received for his child, as a gift from her grand-father, $1,000 in the price of the land? Would it not, if it conformed to the real intent and nature of the transaction, be in effect a transfer of so much of the price of the land to the grand daughter, and would not this give a lien which, although subject, if not reserved in the deed, to be defeated by a subsequent sale to a *bona fide* purchaser without notice, would be valid against the original grantee? And would it not be

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PIERCE vs PIERCE.

proper, and in case of the insolvency of the father, would it not be incumbent on the grand father to secure the benefit of his gift to the intended donee, by reserving this lien, or otherwise protecting the interest of his grand daughter in the deed itself? We think the obligor might, in such a case, resist the execution of the contract, and that the Chancellor, upon his suggestion or on the prayer of the donee, would not enforce it, except upon such terms and in such mode as would secure the real object of the donation as evidenced by the contract itself. And so if the obligor in this case had been the uncle or a stranger, instead of the father of Mrs. Pierce, and the gift to her had been made in the bond just as it is, with the requisition of a receipt from her husband, we should not doubt that the obligor might, and the Chancellor would, under circumstances indicating the necessity of so doing, or even upon suggestion of danger, provide for the interest of the wife by securing to her the benefit of the intended donation.

If a conveyance be made of land to A., and B. prove that he paid a part of the price for his own use, with the intent to secure an interest in the land, a trust results in favor of B., though not named in the deed. If the deed recite the payment by B. then A. would hold in trust for B.

Again, if a conveyance of land is made to A, and B proves that he paid a part of the purchase money for his own use, and with intent to have an interest in the land, a trust results in his favor upon the title itself, though he is not named in the deed, and he may have a portion of the land. And if the deed to A. mentions that a certain part of the price was paid by B, there could be no doubt that A would be held as a trustee, and that B would be entitled either to a portion of the land or to the money, with a lien on the land for its security. The only question in such a case, would be whether the fact was stated for the purpose of evidencing an interest in the use of the land, or as evidencing a lien only.

In the case before us, the only difficulty arises from the supposition that the gift, though declared to be to the daughter, is really intended as a gift to the husband, or must, from the relation between them, have that operation, and from the assumption that the only benefit intended to the wife, was in the conveyance of the land to the husband, as provided for, wherein it is inferred that as there is no stipulation for a trust or reservation in her favor in the conveyance, she can be entitled to none.

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But suppose the deed had been made, reciting the consideration of $1,500, of which $500 were paid by Pierce and $1,000 by his wife, furnished by her father, the grantor, for that purpose, or receipted for as being a gift to her, and conveying the land to Pierce in fee simple, would it not be clearly inferred that this recital was intended to create and prove an interest in the wife, either in the land or the money? And would this inference be weakened by a receipt from the husband, showing that he had received that sum of money given by the father to the daughter, in the price of the land, or merely for so much money given by the father to his wife?

But this executory contract is entitled to a construction at least as liberal as a deed, for ascertaining and giving effect to the intention of the parties. If the father had merely intended in behalf of his daughter, such benefit as she might derive from a conveyance of the land to her husband, it would have been unnecessary, as it is unusual to make the specific reference to the gift to her as a part of the consideration. The fact of specifying the gift to her in the price of the land, proves that a specific benefit was intended for her, and the requisition of the receipt from the husband when the deed should be made, was intended as a bar to that extent, of any future claim by him or his wife in her right, and might have been made for the additional purpose of expressing in it more distinctly, and of securing the intended benefit to the wife. Considered only in the first aspect as a voucher to control the disposition of the father's estate after his death, and to bar his daughter from any claim upon it to the extent of $1,000, it strengthens instead of weakening the inference arising from the recited gift to her, that a substantial and specific benefit was intended to be secured to her by the gift. Even in this aspect, and more especially if the receipt was referred to as a means of specifying and securing the intended benefit, the father would have had a right, in consummating the contract, to have secured the interest of his daughter, by expressing a trust, or reserving a lien in her favor. And the Chancellor would have the same right in enforcing specific execution after his death. But the reference to the receipt to be given

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PIERCE vs PIERCE.

when the deed is made, tends to show that the intended gift to the daughter was only then to be consummated, that there was in fact only an agreement to give $1,000 in the price of the land to her, and to consider it as given in conveying the land. If this were not so, why was not a receipt at once taken, showing the advancement? And if this be so, is not the thousand dollars still unadvanced, and are the creditors of the insolvent husband entitled to wrest it from the wife, to whom it was intended to be given?

In any view of the case, we are of opinion that there is in the bond itself such evidence of an interest and equity in behalf of Mrs. Pierce as requires protection by a Court of equity, and such as being apparent in the bond must overreach all equities created by the husband. We are further of opinion, that as the husband was bound to pay the residue of the price of the land, after deducting the $1,000 paid or to be paid in the gift to the wife, he and not she should bear the loss consequent upon a sale of part for the purchase money which he should have paid, except that her interest in that part is concluded, and must be lost so far as it cannot be satisfied out of the residue. If the entire tract had remained unsold, she would be entitled either to the use of two thirds of the land, or to have her $1,000 made out of it. More than half of the land having been sold under the vendor's lien, she is entitled either to the use of the residue, or to have her money made by its sale. And as it sufficiently appears that it is wholly insufficient to raise that sum, there is no impropriety in having secured the land itself to her and her children. There is the less hardship to the assignee or mortgagee of her husband in this conclusion, inasmuch as he has purchased a larger portion for less than one third of the sum that Mrs. Pierce must give for this. And as there is no intimation that he would prefer a sale of the 34 acres and 100 poles, for the purpose of raising the sum of $1,000, such an experiment need not have been made.

Whereupon, (Judge Breck dissenting from the foregoing views and conclusions,) the decree is affirmed.

Cavan and Cox for plaintiff; *Cord* for defendants.

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Booker, &c. *vs* Gregory.

CHANCERY.

ERROR TO THE WASHINGTON CIRCUIT.

Case 114.

Usury. Practice in Chancery.

JUDGE BRECK delivered the opinion of the Court.

July 22.

ON the 20th July, 1841, Gregory executed a mortgage to Booker, Litsey &c., to secure the payment of about $2,500 to Booker, and of $1,173 58 to Litsey, and of a large amount due the other mortgagees.

The object of the bill.

In 1842, the mortgagees filed their bill for a foreclosure.

In July, 1843, Gregory filed his answer, making it a cross bill against all the mortgagees, alledging that the claims secured by the mortgage included a large amount of usury. That the claim of Litsey was all usury, and that he had paid him a large sum besides, for which he sought a decree.

Gregory's answer and cross bill.

Booker admits that the loans to Gregory had been at the rate of ten per cent. per annum; but contends that a credit claimed by Gregory for $300 as paid in 1839, was in fact paid in March, 1838, and that it was paid in discharge of a note for $303, executed to him exclusively for usury, which then had accrued upon previous loans. This sum, he alledges, was paid as usury, and more than five years before the exhibition of Gregory's cross bill; and in bar of his right to recover it or to apply it as a credit, he relies upon the statute of limitations.

Booker's answer to Gregory's cross bill.

Litsey admits the usury charged by Gregory in part, and denies in part.

Litsey's answer.

The Court below reduced the claim of Booker to $1,247 50, for which a foreclosure was decreed. And as to Litsey, he refused him any relief, and rendered a decree against him in favor of Gregory for $485 42.

Decree of the Circuit Court.

To reverse that decree, Booker and Litsey prosecute severally writs of error, and Gregory assigns cross errors.

The case of Booker will first be considered. The main and important question involved in that case, is

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BOOKER, &c. vs GREGORY.

whether Booker can render available the statute of limitations as to the $303, alledged to have been paid as usury more than five years before Gregory exhibited his cross bill.

Where there was a settlement between the lender and borrower & a balance struck and a separate note taken for usury, and paid off in a few days. Held that the receiver could not rely upon limitation to bar its recovery or appropriation to the reduction of the note for the principal while any part of it remained due.—*Crutcher* vs *Trabue*, (5 *Dana*, 80.)

The circumstances under which that payment was made, are stated by Booker in his answer as follows: That in March, 1838, he and Gregory came to a settlement of the money transactions between them, and it was ascertained that the entire amount of usury upon the two sums, one of $1,200 loaned in 1833, and a subsequent loan of $300, was $303, for which he took Gregory's note payable in eighteen days, and which was paid at maturity; and for the amount of principal loaned and six per cent. up to that time, being $2,000, he took Gregory's note payable in twelve months, including ten per cent., for $2,200.

According to the case of *Hodge* vs *Owens*, (5 *Monroe*, 92,) it is insisted the statute applies and is an effectual bar to the recovery of the amount, or the right to apply it as a credit.

The principal difference between that case and this, is that the borrower in the former case, applied to a Court of equity for relief, and in the latter the lender first comes into equity. But to what extent that fact would vary or affect the rights of the parties, we need not stop to enquire, as we are disposed to regard the case of *Crutcher* vs *Trabue*, (5 *Dana*, 80,) as virtually overruling the case of *Hodge* vs *Owens*. It is true in the case of *Crutcher* vs *Trabue*, the statute was not expressly relied upon by Trabue, who had exacted the usury. But the principle is recognized in that case, that the borrower cannot recover back usury, either at law or in equity, until he has paid the principal. Upon this principle the lender could not rely upon the statute, or it would not commence running till the borrower was entitled to demand and recover the usury. It seems to us this is the true equitable ground upon which it should be placed. Had Gregory paid the $303 at the time the note for $2,200 was given, the note would have been for that much more, and the interest thereon, than he owed. It was for that much more than Booker in conscience had a right to claim. It was op-

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pressive to take both notes, even if the large one had only been for the amount of principal and legal interest. If the $303 was actually paid, or if the note for it was designed to be paid, or as payment, then it was unjust to require the large one for the amount for which it was given. The payment of the $303 was a part of the *res gesta*. It was paid on account of the lending and borrowing. The mere fact of calling it the usury which had then accrued, did not have the effect to separate the transaction or to dissolve the connection and relation which it bore to it. The giving the small note was as much a part of the transaction as giving the large one. Taking, therefore, the two notes as equally constituting parts of the transaction, it would of course follow, that in the aggregate, they were for more than was due Booker. Neither note was a payment, but each was *prima facie* evidence of debt to the amount due by the obligor. If the small note was paid, it followed, of course, that it would be unconscientious in Booker to require payment of the whole amount of the large one. It was not all due him and a Chancellor should lend him no aid in its collection.

This Court in effect decide, in *Estill* vs *Rodes, &c.*, (1 *B. Monroe*, 314,) that usury actually paid, is a deposit in the hands of the lender, subject to be reclaimed by the borrower, and in *Wood* vs *Gray's executors*, (5 *B. Monroe*, 92,) it is decided that until the election is made by the borrower to reclaim, he is not entitled to interest. Upon the principal thus settled in regard to interest, it is urged that Gregory, in this case, was not entitled to apply the $303 as a payment, until he elected to do so, and consequently, that it should only be so applied at the time the election was made. But we think it was optional with Gregory to treat it as a payment, when made, of so much of what he owed Booker; as a return of that much of the money borrowed. The effort by the lender, to separate the *chaff* from the *wheat* is merely ideal. The true question for the Chancellor to decide is, how much of the loan and legal interest has been reimbursed, and how much remains unpaid; and if more than the principal and interest has been paid, when was the excess paid? That the borrower was not bound to

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BOOKER, &c. vs GREGORY.

pay, and he has a right to reclaim it as soon as paid, and from that time, and not till then, the statute would commence running.

All payments made for usury may, at the option of the payor, be regarded as payments of so much of the principal and interest at the time when made, until the principal and interest is fully paid off. *Wood* vs *Gray's Ex'r.* (5 *B. Monroe*, 92.)

In a word, the doctrine we consider as settled, that all sums paid by the borrower to the lender, although at the time of payment denominated usury, will be treated as payments of the principal and legal interest, at the election of the borrower; and that payments thus made, are not, for any purpose, to be considered as usury, while the principal and legal interest remain unpaid. The election of the borrower entitles him to a credit at the time the payment was made. This right is reciprocal. The lender may so treat it by actually crediting the borrower for so much of what he is justly owing him. It results, therefore, that the $303 paid by Gregory to Booker, cannot, for any available purpose, be treated otherwise than as a payment of that much of what the former justly owed the latter. Neither could render it available as a payment of usury. The position contended for, therefore, in regard to the time when the $303 should be applied as a payment, cannot be sustained. It was properly applied at the time, when in point of fact it was paid. These principles were expressly recognized by this Court, in *Wood* vs *Gray's executors*, *supra*, and are considered as the correct and settled doctrine; and we deem it unnecessary, therefore, more particularly to notice the arguments and authorities relied on by counsel to overturn it

No error is perceived in the record to the prejudice of Booker. Nor are we satisfied that the decree ought to be disturbed upon the cross errors.

When a party, defendant on the rendering a decree of foreclosure of a mortgage consented that interest should be compounded, the Court should not permit him to repudiate his agreement of record.

The objection that Gregory was entitled to an additional or larger credit, is not deemed available. Nor did the Court below, in our opinion, err in permitting the interest upon the sums actually loaned by Booker to be annually compounded. When the interlocutory decree was rendered, Gregory came into Court and consented that the interest should be computed in that way. Subsequently, upon the coming in of the Commissioner's report, he sought to repudiate the consent thus given. The Court overruled the exception to the report in that behalf,

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and we think correctly. First, because it was trifling with the Court, after having agreed to the mode of computing the interest, to attempt to avoid it solely upon the ground that the Commissioner had not allowed him as large a credit as he had claimed.

But, secondly, the Court was right in overruling the exception, apart from the consent. There was a virtual renewal of the loan by the parties annually. Separate notes appear to have been annually given for the interest, legal as well as usurious. From Gregory's own showing, the debt or loan was annually renewed; and consequently, according to *Rodes* vs *Blythe*, (2 *B. Monroe*, 335,) and other cases, Booker was entitled to his principal and legal interest by that mode of computation.

As between Booker and Gregory, the decree, therefore, is right, and is affirmed upon both the original and cross errors.

Morehead & Reed and Shuck for plaintiffs; *McHenry and Harlan & Craddock* for defendant.

Basham *vs* Chamberlain, &c.

CHANCERY.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Case 115.

Husband and wife. Wife's separate property.

JUDGE SIMPSON delivered the opinion of the Court.

July 23.

THIS is a suit in chancery in the name of the wife, by her next friend, to enjoin a judgment creditor of her husband from selling a Rockaway carriage, harness and horse, in satisfaction of his debt, and to have the property secured to her separate use by the decree of the Chancellor.

Case stated.

The facts upon which she bases her right to relief, are, that when she married her husband, he was insolvent; that she had a small sum of money which he has permitted her to retain under her own control, and to use as she thought proper; that he also permitted her to have some of the profits of her own personal industry, all of which she placed in the hands of a friend, who managed it for her, until her money and her savings amounted in the

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BASHAM vs CHAMBERLAIN.

aggregate to the sum of four hundred dollars; two hundred and fifty dollars of which she appropriated to the purchase of the property upon which the execution against her husband has been levied. That the property was purchased and transferred to her in her own name, and obtained not as an article of luxury, but as a means recommended by a physician of regaining her health, through the exercise that riding in it would afford her; her health having been seriously impaired by her domestic labors and fatigue, and its re-establishment being important to enable her to take care of several small children, whose support mainly depends upon her exertions.

The facts presented are such as make a strong appeal to the sympathy of the Chancellor; but the rights of the complainant must be decided by settled principles and the law of the land, and not by considerations which address themselves to such feelings, even though they be the best feelings of our nature. If the complainant can have any relief in a Court of equity, it must be either upon the ground that the property which has been taken in execution, is her separate estate, and therefore not liable to be taken and applied to the payment of her husband's debts, or that it is of that nature which entitles her to an equity, to have a settlement out of it for her support.

A contract before marriage that the wife shall enjoy her property exclusively, is valid, and the husband will be regarded as a trustee for the wife's benefit.

If a contract had been made before marriage, by which this small pittance had been settled on the wife as her separate estate, and by which a right had been given to her to trade on it, and manage it for her own exclusive profit, such a contract would be deemed valid in equity, even without the intervention of a trustee, not only as to the husband, but also as to his creditors. To support the agreement, and secure the property to the wife, the husband would be regarded as her trustee, and as holding in that capacity the title to it for her separate use and enjoyment.

—And the personal savings of the wife, the result of her labor, may with the assent of the hus-

And the personal savings and profits made by the wife, the results of her industry and economy, may with the consent of her husband, be applied to her separate use, which she will have in equity a right to retain and treat exclusively as her own, so far as it regards her husband,

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or his representatives after his death, where the right of a creditor does not intervene.

Whatever personal property or money, however, the wife has in her possession at the time of the marriage, vests absolutely in the husband, and becomes his for every purpose. The proceeds of her labor and industry also belong to him. He can make no voluntary disposition of his property to the prejudice of his creditors, either in favor of his wife, or any other person, which will be legal and valid. He may, it is true, even after marriage, upon a legal and adequate consideration to support it, make a settlement upon his wife, which will be sustained, and by which she will become invested with a separate estate, free from his control, and beyond the reach of his creditors.

By the complainant's own representations, it appears that her husband was insolvent when they were married, and that the arrangement, which resulted in the accumulation of the fund appropriated to the purchase of the property in contest, was made subsequent to their marriage, at a time when a voluntary settlement by him upon her was not valid as against creditors, it being his first duty to apply his property to the payment of his debts. Inasmuch, therefore, as the money belonged to the husband, and as she must necessarily derive her claim to the property through him, and as he was not in a condition which enabled him to bestow upon her a gratuity, she has not such a separate interest in it as authorizes a Court of equity to interfere in her favor and secure her in its enjoyment.

Can the complainant derive any assistance in support of her claim to relief, from the equity which the wife has, to have a settlement made for her support out of her own choses in action and equitable interests in property? This equity, it is true, will be enforced not only against the husband, his assignees and creditors, where they are complainants seeking aid and relief in equity, but it will also be enforced where she brings a suit in equity for the purpose of asserting it. A Court of equity will also, at her instance, for the purpose of enforcing her equity to a settlement, arrest the collection of her choses in action

band, be applied to her separate use, so far as the husband and his representatives are concerned; but not against his creditors.

Personal property in possession of the wife at the marriage, vests absolutely in the husband; the proceeds of her labor belong to him, which he cannot *voluntarily* dispose of to the prejudice of creditors, but upon good consideration he may settle it upon the wife.

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either by the husband or his assignee: (*Clancy on the Rights of Married Women, B. 5, ch. 2, from page 463 to 470.*) And this settlement will be enforced in opposition to the assignment by the husband for a valuable consideration: (3 *Vesey*, 506; 4 *Vesey*, 15;) *Thomas, &c.* vs *Kenedy, &c.*, (4 *B. Monroe*, 235.)

The loss of the wife's right to survivorship in her choses in action does not necessarily deprive her of her right in equity to a settlement.

It is a mistake to suppose, that when the wife's right of survivorship to her choses in action has been defeated and taken away, that her equity to a reasonable provision out of them for her support has been necessarily lost. An assignment by her husband for a valuable consideration, deprives her of the right of survivorship in her choses in action, yet the same act, as the foregoing authorities conclusively prove, does not divest her of her equity to a settlement out of the same estate. The assignee takes it, discharged it is true, from the wife's legal right of survivorship, but subject to her equity for a settlement. The two questions present very different principles for consideration; and the right to the one, is not the distinguishing test of the right to the other.

But the doctrine on this subject, pushed to its utmost limits, is not sufficiently comprehensive to furnish any aid to the complainant. The property claimed by her does not consist of her chose in action, or any equitable interest of hers, or of a right of property which has accrued to her during coverture, and which her husband has not reduced into possession; but of property which has vested absolutely in the husband, which belongs to him, and in which she has no available equity.

An attempt has been made to assimilate this to the case of *Athey, &c.* vs *Knotts, &c.* (6 *B. Monroe*, 24.) They bear, however, little or no resemblance to each other. In that case the fund which the Court refused to aid the creditor of the husband in reaching and applying to the payment of his debt, arose from the sale of some land in the State of Indiana, in which the wife had an interest, and which had never come to the hands of the husband. The attorney, and the intermediate agent who received the money, acted for the wife, at least such is the necessary implication, the husband never having attempted to obtain the possession of it, or to exercise any control over it.

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The complainant not being entitled to relief on either ground, and the Chancellor having sustained a demurrer to her bill and dismissed it, the decree must be affirmed.

Pilcher for plaintiff; *Fry & Page* for defendants.

Commonwealth, for Russell *vs* Brassfield.

COVENANT.

ERROR TO THE ROCKCASTLE CIRCUIT.

Case 116.

Evidence. Surety and principal.

JUDGE BRECK delivered the opinion of the Court.

July 26.

THIS was an action upon the official bond of a Constable against him and his surety, and the main question is, whether the admissions of the former, made nearly three years after the expiration of his office, in regard to the collection of money by him while in office, for the plaintiff or relator, was competent testimony against the surety. We think it was not.

The general doctrine is, that the declaration of the principal, made subsequent to the act to which they relate, and out of the course of his official duty, are not admissible as evidence against the surety.

The confessions of a principal officer made long after his term of office has expired, are not evidence against his sureties in a suit on the official bond: *Greenleaf on Ev.* 219.

Thus it has been held, that if one becomes surety in a bond, conditioned for the faithful conduct of another, as Clerk or Collector, confessions of embezzlement, made by the principal after his dismissal, are not admissible in evidence in an action on the bond against the surety: (*Greenleaf on Evidence*, 219.) So also it was held that the admissions of one partner after dissolution, is incompetent to render liable the other partner.

The objection to the form in which the instruction upon this point was given, is not considered valid. The transcript from the record of the Justice, shows that certain executions issued in favor of the relator, and that some of them were returned satisfied. But it does not show that those executions went into the hands of Brassfield, as Constable or otherwise, or that the returns were made by him; nor is there any evidence in the record upon this point, except the fact that the judgments upon

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McDougle vs Clark.

which the executions issued, appear to have been rendered upon claims placed in Brassfield's hands by the relator for collection. From that fact the jury might have inferred that Brassfield received the executions and made the returns. But it was not sufficient ground for a new trial, that the jury did not so infer.

Perceiving no error in the record to the prejudice of the plaintiff, it is therefore, affirmed.

Herndon for plaintiff; *Caperton* for defendant.

Mill Case.

Case 117.

McDougle *vs* Clark.

Appeal from the Christian County Court.

Mills.

July 26.

Chief Justice Marshall delivered the opinion of the Court.

Case stated.

This appeal brings up an order of the County Court of Christian county, granting to Isaac Clark the privilege of erecting a mill and dam on the west fork of Red river, upon his paying ten dollars, the value of an acre of ground, the property of McDougle, condemned by the inquest, and also $7 50 assessed by the inquest as damages to be occasioned by the overflowing of three-fourths of an acre of McDougle's land.

Grounds of opposition to the erection of a mill dam.

The grant of this privilege is opposed by McDougle on two principal grounds: 1st. That the proposed dam will entirely destroy a spring on the margin of the creek, a few yards only above it, the use of which he claims to be important to the occupants of his adjacent farm; and, 2d. That it will entirely destroy the use of his own dam and mill situated within one hundred yards above the proposed scite of the new dam. He insists that these certain consequences of the exercise of the privilege granted to Clark, either constitute an insuperable objection to the grant, or require, as a pre-condition to its operation, that he himself, should be compensated for the injuries which they imply, the entire omission of which compensation, is alledged to be an important error in the proceeding, even if the privilege should have been grant-

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ed on any terms. It is contended on the other hand, that the existing dam of McDougle is worth nothing, that the mill having been burnt down nearly two years before the present application was made; and no indication having been given of an intention to rebuild it, nor any step taken with that view, until after this application was made, the mill privilege of McDougle was lost, and that the little mill built by him during the pendency of this proceeding in the County Court, was a mere pretence resorted to for the purpose of defeating this application, and preserving his own privilege without a real compliance with the objects for which it was granted or the requisitions of the law; and that the dam and mill and claim of privilege were, therefore, properly disregarded. And with regard to the alledged spring, it is contended that it is a mere seap from the old dam, of no value, and never used or regarded as a spring until it was deemed important to treat it as such with a view of defeating or obstructing the present application.

It appears that when the jury acted under the writ of *ad quod damnum*, the place claimed as a spring was covered by the creek, which was then flush, and it does not appear that McDougle, who lived in the State of Tennessee, and at some miles distant from the premises in question, had any notice either of the application or of the holding of the inquest, until after the writ was returned. These facts are only important as tending to show that the interests of McDougle may not have been fairly presented to the jury, or fully considered by them, and thus to free the question as to the extent of the injury done to him in respect to his spring and dam and mill privilege, from the weight of any inference which might be drawn from the silence of the inquest in relation to it.

The principal question in the case is, whether the failure of McDougle, for near two years, to commence the re-building of his mill, and his declarations previous to Clark's applying for the privilege, importing that he did not intend to rebuild, authorized the County Court to disregard entirely, both his claim of privilege and his dam and mill, as they actually existed before and at the time of granting the privilege to Clark. The 6th section of

The overflowing of a spring by the erection of a mill dam, is a proper subject of consideration in determining upon the propriety of permitting its erection: (1 *Bibb* 377; 3 *A. K. Marshall*, 528.)

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McDougle vs Clark.

the statute regulating this subject, (2 *Stat. Law*, 1214–15,) after enumerating several inquiries which shall be a ground for refusing leave to build a mill and dam, puts the determination of the question, in the absence of these inquiries, upon the reasonableness, under all the existing circumstances, of granting or refusing the leave asked. Among the circumstances to be considered and compared in coming to a conclusion, the existance and degree of public necessity or convenience demanding the erection of a mill as proposed, is doubtless entitled to the first place: and although the particular advantage of the individual making the application, is not to be regarded as a motive for action by the Court, the injury to be occasioned to other individuals is to be considered. And in proportion to the magnitude of such injury, so must be the urgency of the public exigency, to justify the Court in inflicting the injury, which even then cannot be properly authorized except on the terms of making compensation. Hence, although the destruction of a spring used for domestic purposes, is not one of the injuries on which the statute grounds its prohibitions, it has been decided that such an objection should prevail in defeating an application for leave to build a mill, &c., unless the public necessity imperiously require it, and that even in that case compensation should be made: (1 *Bibb*, 379; 3 *A. K. Marshall*, 328.)

In this case we may say, that although the convenience of the immediate neighborhood would doubtless be promoted by the erection of a good mill at the proposed site, in case there was not one at the old site of McDougle's mill, yet there is shown to be such a number of mills within convenient distance around, that we do not think the necessities or even convenience of the public is so far involved as to be entitled to any very decisive effect in determining the question, and certainly not to such an extent as to require the infliction of serious injury upon any individual.

The existence of a mill, tho' without regular establishment near

But it is said in effect, that the dam and mill of McDougle, besides being of little or no value, exist without any right on his part, and do not answer the public requirements, and that, consequently, their actual existence

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should form no obstacle to the grant of a mill to another, and their actual destruction should, in law, be regarded as inflicting no injury on McDougle. If the premises of this argument were true, they would be far from proving that the actual existence of a mill and dam within a hundred yards of the proposed erection, (though not coming up to the wishes of the neighbors,) and their certain destruction by the dam proposed, are not circumstances affecting the reasonableness of the proposition for a new mill. They are circumstances entitled to weight upon the question, because on the one hand they actually supply, to some extent, the wants and conveniences of the public, and so far diminish the force of any requistion for a new mill, and on the other, they constitute an actual interest which will be injuriously affected by the new dam, and which, therefore, should not be disregarded.

to a proposed mill dam, and which will be destroyed or materially injured, is a subject of consideration in determining upon the propriety of permitting a new dam to be built.

But we have not been convinced and do not admit that McDougle's present mill, though not commenced until more than one year after the old one had been burnt, nor until after Clark's application had been made, is to be regarded as existing against or without right, and as not being entitled to the protection of the law. A privilege had been granted for erecting the mill and dam as early as 1811, and although they may not, in fact, have been erected nearer than half a mile from the point designated in the grant, they were, in fact, erected or commenced in 1811, and have continued ever since, until the mill was burnt, (with some injury to the dam and forebay,) in the spring of 1844; and in March, 1846, the small mill was erected, which has been in operation since. The application of Clark was made in February, 1846; the writ of *ad quod damnum* was returned in March, when a summons against McDougle was ordered, which does not appear to have been executed until April; and at the May Court the order was made granting to Clark the privilege to build a mill.

Whether the mill was originally built under the order of 1811 or not, its legality, after a continued enjoyment of 33 years, must be assumed. The mill and one of the abutments of the dam, were on the land owned by the party who erected them, and the dam was extended

—Such should be the case, whether the will had been legally established or enjoyed for a great length of time.

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McDougle vs Clark.

across the creek and the abutment erected on the other side with the knowledge of the owner of the bed of the creek and of the land on that side, who not only acquiesced, but in a few years afterwards, and more than twenty years before the mill was burnt, conveyed to the then owner of the mill, five acres of land, including the abutment last referred to, and running up and down the creek at low water mark. To the rights arising from these facts and from the continued enjoyment of the mill and dam and the adjacent land, McDougle succeeded; and we are satisfied that when his present mill was burnt, he was to be regarded as the owner of both sides, and also of the bed of the stream, and was fully authorized by law to rebuild his mill.

The statute declaring a reverter of land condemned for mill purposes, for a failure to rebuild, does not in terms apply to cases where the owner of the mill owns the land on both sides of the stream.

The 14th section of the statute declaring as the consequence of a neglect for more than one year to re-build a mill, the reverter of the condemned acre of land to its former owner, does not literally apply to this state of case, because McDougle owned five acres on which his dam abutted on the one side, and near 300 acres on the other. And this provision can have no other operation in such a case, but that which is clearly indicated as its object, viz: to authorize the County Court, in obedience to the public exigencies, and in view of all the circumstances of the case, to grant the privilege to another if the previous grantee unreasonably neglects the service which is the real consideration of the grant. The same section imposes the same forfeiture of the condemned acre, in case of a failure to commence the mill in the first instance in one year, and to complete it in three, or to keep it in good repair afterwards. But surely this would not authorize the Court, without regard to other circumstances, to grant the privilege to another, with the effect of destroying not only the first privilege, but whatever may have been done and expended under it. The Court is to act reasonably and with discretion, in view both of the public necessity or convenience and of the private injury; and although the fact that a man has an advantageous site for a mill which he has never attempted to appropriate in that way, and that it will be destroyed by granting the privilege to another, is entitled to no considera-

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tion whatever, in deciding on the application of another, and is not even to be regarded as implying a specific injury for which he is to be compensated, (for such a principle might often defeat every application,) the case is very different when one of several persons having sites upon a stream, has actually appropriated his own site and the flowing water to the uses of a mill. It is to be a matter of sound and reasonable discretion, whether his preparations for the accommodation of the public are such as should be deemed sufficient to prevent a grant to another to his injury, and how long, when as in this case he is the owner of both sides of the stream, one who has obtained a grant of the privilege may neglect to commence or complete his dam and mill without forfeiting the preference or advantage which he has acquired. If in consequence of the grant, he had purchased the fee of the land on which the dam was to abut, and had made other expenditures preparatory to the work, the mere failure to have made an actual commencement of the building within a year, would not be a reasonable ground for granting the privilege to another, with the effect of destroying the value of his outlay, if there was reasonable ground to believe that he would proceed to make such a mill as the public exigencies required, and in such time as would put the public to no serious disadvantage. And so if he had commenced within the year, and before the expiration of three years had made considerable progress in the work, nothing would justify the grant of the privilege to another with the effect of destroying, without making compensation, the value of what the first had in good faith done towards the erection of a mill and dam, unless his delay was wholly inexcusable, and the circumstances showed an utter disregard of the public requirements, and in effect an abandonment of his privilege. We think the case of the casual destruction of the mill or dam, after they had been completed, leaving a portion of either, which might be substantially useful in re-constructing them, stands virtually on the same ground; and that even if the mill and dam were both swept away, the owner who had met with such a misfortune would, even after the lapse of a year without beginning to rebuild, be entitled to

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McDougle vs Clark.

preferance over any new applicant for a privilege which would destroy the first, unless it should appear that the first grantee had delayed re-building without reasonable excuse, or that he would not re-build in such manner and within such period as would meet the public exigency. And we think the same principles are applicable to the case whether the first mill were erected under a grant of privilege in pursuance of the statute, or having been erected without such grant, had by long continuance, established the right of the owner. The right thus established, by long use and enjoyment, is not superior to the right granted under the statute, and is equally subject in case of neglect, to be defeated by a new grant under the statute.

The court should exercise the power of permitting a new mill to be erected after one has been destroyed, with a reasonable regard to the public necessity and the rights of the owner of the former mill, and protect his interest and rights against injury from the grant of a new mill privilege.

In the present case, the remaining dam of McDougle, though requiring repair, is not in such a condition as to be without value, or useless in the preparation of a useful mill, casual declarations importing a disinclination to incur himself the expense of re-building, indicating the apprehension that the former mill had been burnt down to injure him, but implying a continued assertion of the right, and an expectation that the mill would be re-built, are not evidence either of a waiver or of an entire disregard of the public interests, which, as we have said, do not imperiously require a mill at that place. The fact, that up to the commencement of the present proceeding, his purchase of the property made in 1842, was not completed by conveyance, and probably not by full payment, and that the title remained in the infant heirs of the former owner, whose right is saved by the statute, may form some excuse for the delay in commencing or providing for the re-building of a proper mill. And this proceeding itself, which threatened to destroy the entire value of his privilege, and of whatever he might attempt to do under it, accounts for and excuses the character of the slight structure and inefficient machinery which was hastily put together in March, 1846, and which being in truth nothing more than a makeshift to preserve his right, should not be regarded as a compliance with his duty and the objects of the statute, but only as evidence of his intention to comply, and thus to preserve his privilege. We

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do not concur in the position that his acts done under an existing right after the commencement of this proceeding, are not to be taken into consideration in determining on the propriety of granting the adverse application, any more than we concur in the position advanced on the other side, that his privilege established by long user can only be lost by non-user for twenty years. The privilege, however, established has its corresponding duties, which constitute the consideration for protecting it, and according to the spirit and intent of the statute, is subject to forfeiture for the unreasonable neglect of those duties.

Without laying any stress upon the circumstance which as it is argued, should have prevented Clark, in consequence of his connection with the title and the purchase of McDougle, from attempting to defeat his privilege, we are of opinion, for the other reasons advanced herein, that his privilege and his property connected with it, could not properly be disregarded when this application was granted, and that they at present, constitute such an obstacle that the privilege should not have been granted to Clark, without making compensation to McDougle, at least to the extent of the actual value of his present mill and dam. But as by the present decision, McDougle's privilege will be established, we are of opinion, that in analogy to the requisition and in accordance with the object of the statute, it will be incumbent on him, in order to preserve his privilege, to proceed in good faith, within a year after this case returns to the County Court of Christian, to put his dam and mill in such a condition as will be substantially serviceable, and will promise to meet the wants of the public. The present mill is not of that character.

With respect to the spring, we need only say that although the evidence with regard to its use and quality is very contradictory, and although we are inclined to the opinion that it is a seap from the dam above, and is little better than the water in the creek by its side, and has not been habitually relied on for domestic purposes, it is still of some value as a spring, and its loss should have been compensated in establishing the mill below it.

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MARKHAM'S EXR. vs JONES.

But upon the whole case, we are of opinion that under the existing circumstances, the grant of the privilege to Clark, upon payment of the two sums named in the order, was unreasonable.

Wherefore, the said order granting leave to Clark to build a mill and dam below and near McDougle's dam, is reversed, and the cause is remanded with directions to overrule his application.

B. & A. Monroe and Robertson for appellant; *Harlan* for appellee.

CHANCERY.

Markham's Executor *vs.* Jones.

Case 118.

APPEAL FROM THE BATH CIRCUIT.

Partnership. Dormant partners.

July 17. JUDGE BRECK delivered the opinion of the Court.

Case stated.

A careful examination of all the facts and testimony in this case, has brought us to the conclusion:

1st. That at the date of the note in contest for $567 50, the testator, Markham, was not, in point of fact, the partner of Allen A. Miller in the manufacture of hemp.

2d. That Jones did not sell his hemp and receive said note upon the supposition that Markham was the partner of Miller, or under the belief or impression that such was the fact. On the contrary, that he sold the hemp to Miller, took his note for it, and looked to him alone for payment.

Upon the question of fact as to the alledged partnership, Miller, we think, was a competent witness. From his testimony it satisfactorily appears that there was no partnership at the date of the note, and when he purchased the hemp. That it was after that time he told Markham that he might consider himself a partner. No partnership, of course, could exist without the knowledge and consent of Miller. Whether what subsequently passed between Miller and Markham, was sufficient to constitute a partnership between them, it is not necessary to inquire. It clearly appears that Miller bought the hemp

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and executed his note for it in the presence of Markham and Jones, a circumstance in view of all the other facts in the record, strongly corroborating the testimony of Miller, that no partnership, at that time, existed. There is, besides, the statement of Jones that Markham always told him he was not a partner, or denied that there was any partnership, and he believed him an *honest truthful man*.

Upon the second proposition, that Jones did not sell his hemp and take the note of Miller alone, upon the faith of an existing partnership between him and Markham, the testimony is still more satisfactory and conclusive. He does not even alledge in his bill that he made the trade with Miller upon the faith that Markham was a partner, or that he considered him, at the time, responsible or looked to him for payment. For near nine years afterwards, during the life of Markham, he always spoke of it as the debt of Miller, and there is nothing in the record going to show that he ever contended, during that time, that it was the debt of Markham, or that it had been contracted upon his credit or supposed liability.

Assuming then that in point of fact, Markham was not a partner of Miller as alledged, and that credit was not given by Jones to Miller under the belief that such was the fact, we are of opinion that Markham would not be responsible, although he might have represented himself as a partner, both before and after the transaction between Jones and Miller.

If one represent himself to be a partner, and credit is given upon the faith of the representation, such person will be responsible as a partner, whether actually so or not.

The doctrine is well settled, that if a person represents himself as a partner, and credit is given upon the faith of the representation, that such person would be responsible as a partner, whether actually so or not. And in this case from the representations of Markham, the presumption might well be indulged, that Jones was aware of them, and consequently relied upon his credit in the transaction with Miller, but for the satisfactory evidence to the contrary.

—But representations to one person that he is a partner, will not make such person, (who is

The personal representations by Markham to Robertson and Dooley, &c., early in 1836, that he was a partner, was not, in our opinion, such a public holding forth to the world of the fact, whether so or not, as to render

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BILLING vs PILCHER & HAUSER.

not in fact a partner,) responsible to another, who has no knowledge of, and did not rely upon such representations. — *Smith's Mercantile Law, p. 23, note P.*

him responsible to Jones, to whom he made no representations of the kind, who was not aware that any such had been made, and who in the transaction with Miller, did not rely upon the existence of such a partnership: *Smith's Mercantile Law, side page* 23, *note p.*

It results that the decree is erroneous and must be reversed, and the cause remanded with directions to dismiss the complainant's bill and dissolve his injunction with costs and damages.

B. & A. Monroe and Robinson & Johnson and Smith for appellant; *Apperson and Cavan* for appellee.

ASSUMPSIT.

Case 119.

Billing *vs* Pilcher & Hauser.

ERROR TO THE JEFFERSON CIRCUIT.

Husband and wife. Necessaries for the wife.

July 27.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court,

Case stated.

PILCHER & HAUSER having recovered a judgment against Billing for $25, their fee for services rendered to his wife in filing a bill against him for alimony and divorce, he prosecutes this writ of error for the reversal of the judgment.

It appears that on the 16th of September, 1845, the bill was sworn to by Mrs. Billing, and filed by Pilcher & Hauser, making general charges of cruel, inhuman and barbarous treatment against her husband; that he had repeatedly laid violent hands upon her, and threatened to do so again; that he threatened to leave her and go to Europe, &c., together with other less serious charges. On the 23d of September, Billing answered the bill, denying every material allegation, and inviting his wife to return and live with him. And on the 4th of October she directed the dismissal of the suit and returned to her husband. Besides reading the bill and answer to the jury, the plaintiffs proved that $25 was the usual fee in such a case. The defendant then proved by a witness who had resided in the same house, that he had treated his wife well, &c., and that she had no cause for leaving

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him and bringing the suit, and had returned as soon as she dismissed the suit.

Upon this evidence the Court instructed the jury in effect, that if the plaintiffs had filed the bill in good faith, upon the representations of Mrs. Billing, her husband was liable for the reasonable value of their services, and that her swearing to the bill was evidence of her representations to the plaintiffs. The propriety of this instruction is the only question which need be considered.

The instructions of the Circuit Court.

It is well settled that a wife who is wrongfully turned out of doors by her husband, or from ill treatment is obliged, by a regard to her own safety, to leave his house, carries with her an implied credit, or an implied authority to charge him for necessaries, which as a wrong doer, he shall not be permitted to repel. The principle is, that being bound to support and protect his wife, he cannot relieve himself from this obligation by his own wrongful act, but that if by his own improper conduct towards her, he drives her to seek support and protection from others, or justifies her in so doing, the law still holding him to his duty under the new circumstances which he has brought about, implies an authority from him to any one who may furnish at his charge, the necessary supplies or assistance, or an authority from him to his wife to procure them upon his credit. But the essential basis of this implication is, that the husband shall have wrongfully produced, or shall at least have assented to the separation which has rendered it necessary that the wife should receive from others the supplies or assistance which are essential to her support or protection. Hence it is laid down that if a tradesman deal with a wife separated from her husband, it is incumbent on him to make inquiry; that he trusts her at his peril, and that if he would make the husband responsible for the articles furnished, he must prove that the separation occurred under such circumstances as will render the husband *prima facie* liable.

A wife who is wrongfully turned out of doors by her husband, carries with her an implied credit, and authority to charge her husband for necessaries.

The same principles apply to the case of legal assistance furnished to the wife. If the conduct of the husband towards her, makes it necessary that she should apply to the law for securing either protection or support, or if it be such as justifies her in so doing, the husband

Those who trust the wife who has separated from her husband; must look to the grounds of separation; they trust the wife on the

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BILLING vs PILCHER & HAUSER.

credit of the husband at their peril, if the separation of the wife be not justifiable.

will be chargeable for the expenses thus rendered necessary by his own improper conduct. In the case of *Shepherd* vs *McKoul*, (3 *Camp.*, 326,) Lord Ellenborough said: "if that proceeding (the exhibition of articles of the peace,) was uncalled for, his wife could not make him liable for the expenses thereby incurred. But if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, charge her husband for the necessary expense of this proceeding, as much as for necessary food and raiment." We have seen no case and perceive no sound principle which sanctions the doctrine that the authority of the wife to bind the husband, or the right of others who deal with her or render assistance, to charge the husband, may be established either by the mere representations of the wife, or by the credit which those representations may gain with the persons to whom she appeals. The authority rests not upon the representations of the wife, nor upon the credit given to them, but upon the evidence of the facts upon which the law gives the authority. In case of separation, good faith requires that those who deal with the wife, intending to charge the husband, should inquire from other sources, whether the circumstances will authorize them to charge him. And if they trust to the mere representations of the wife, they do it at their peril. Whether the evidence in this case would have authorized the jury to find for the plaintiffs on the ground that their legal services rendered to Mrs. Billing, were made necessary by the conduct of her husband, we need not decide. The view which we have taken of the law, satisfies us that the instruction given to the jury placed the question of the defendant's liability on a wrong basis, and withdrew from the jury the real fact which their verdict should have decided.

Wherefore, without noticing other questions which will probably not again occur, the judgment is reversed for the error in the instruction given, and the cause is remanded for a new trial in conformity with this opinion.

Greene for plaintiff; *Fry & Page* for defendants.

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Garris' Heirs *vs* Garris.

DOWER.

ERROR TO THE MUHLENBURG COUNTY COURT.

Case 120.

Dower. Jurisdiction of County Court.

July 27.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

THE Muhlenburg County Court, upon the application of the defendant in error, appointed Commissioners to allot her dower in the landed estate of Sikes Garris, whose widow she represented herself to be. The Commissioners so appointed, proceeded to assign dower, and returned a report, which was quashed, as the order states, for errors apparent on its face. At a subsequent Court the same Commissioners made another report containing an allotment of dower to the applicant, which was approved of and ordered to be recorded.

These proceedings were all objected to by the heirs at law, the present plaintiffs, who appeared in Court and contested the applicant's right to dower upon the ground that she was never married to Sikes Garris, deceased, and if she ever had been, that she had abandoned him in his lifetime and refused to live with him.

County Courts have no jurisdiction to investigate or decide contested claims to dower; they have not the power of adjudicating upon the existence of the right when that is controverted. They can only assign dower when the right to it is conceded. The right being admitted, they can direct an assignment, the propriety of which when made, will involve merely the question of its fairness, and the relative value of the part alloted, to the residue of the land, upon which they must necessarily have the power to adjudicate. Beyond this their jurisdiction does not extend, as was decided by this Court in the cases of *Rintch* vs *Cunningham*, (4 *Bibb*, 462;) *Williams* vs *Williams*, (1 *J. J. Marshall*, 105;) *and Murphey's heirs and devisees* vs *Murphey*, (*ante*. 232.)

County Courts have no jurisdiction to try contested claims to dower. They may assign dower when the claim of the widow to dower is not contested, but in no other case: (4 *Bibb*, 462; 1 *J J. Marshall*, 105; *ante* 232.)

Here the right to dower was denied; it was the matter to be tried. If the applicant had not been the wife of

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McCauley, &c. vs Rodes, Macklin &c.

Sikes Garris, deceased, she had no right of dower in his lands. This question the County Court had no power to pass upon and decide, and without its decision her right to dower was not shown to exist.

Wherefore, the order of the County Court is reversed and cause remanded, with directions to reject the Commissioners' report and overrule the application.

Harlan & Craddock for plaintiffs.

Chancery. *Case* 121.

McCauley, &c. *vs* Rodes, Macklin, &c.

Bill of discovery. Attachment bills. Fraud.

Error to the Fayette Circuit.

July 29.

Chief Justice Marshall delivered the opinion of the Court.—Judge Breck did not sit in this case.

A deed by a husband in failing circumstances conveying a trust for the wife's separate use the property which she was in law entitled as heir to her father, & which had not been reduced to the possession of the husband, is not fraudulent.

It is the opinion of this Court, that as the deed of trust made by Ferguson, for the benefit of his wife, professes to convey only so much of her own estate as had not been reduced to possession by him, or as was not vested in him by law, it did not convey any interest either in the land or slaves which had been allotted to her in the division of her father's estate, but the same having at the time of her marriage, and at the date of the deed of trust, three months afterwards, been in possession of her guardian or his lessees for her, were in her possession, so as to vest in her husband the absolute title to the slaves, and the right to the land during their joint lives. The deed conveys nothing specifically by name or description, but only such property, without specification, as the wife was entitled to as heir or distributee, and as had not been reduced to possession, or become vested by law absolutely in the husband. And as the insolvency of the husband entitled the wife to a settlement out of her property, we are satisfied that there was no fraud either in the intent with which the deed was executed, or in its actual operation, and that McCauley's bill, praying on the ground of fraud in the deed, to subject to the satisfaction of his debt, whatever estate, in land, slaves or personalty, was conveyed by it, did not operate as an attachment or lien up-

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on any estate not conveyed, and was not a *lis pendens* beyond the operation of the deed, because it neither described nor sought to subject any estate derived from the wife, except as estate fraudulently conveyed by the deed, and because it did not seek the subjection of any specific thing, either as having been conveyed, or as not being embraced in the deed; but alledging fraud in the deed, prayed that it might be set aside, and that whatever it conveyed might be subjected. As nothing passed by the deed, the complainant could get nothing by this prayer, and attached nothing, even if he had succeeded in showing fraud. And as the deed would not have been fraudulent, even if something had passed by its terms as not having become vested in the grantor as husband, the complainant would have been entitled to nothing, even under this hypothesis.

A bill by a creditor for a discovery of assets, will not operate as a lien upon any interest or right which might have been known by consulting the public records, and which were not specified in the bill.

It follows, that in our opinion this bill of McCauley constituted no such lien or attachment, or *lis pendens*, as to prevent such interest as Ferguson, the debtor, had in the estate of his wife from passing absolutely to the assignee in bankruptcy, under his application for the benefit of the bankrupt law, made some days after the filing of the bill. And as the three other bills of Strawbridge, Ryan, &c. and Waterman, filed in the intermediate period, do not even mention the deed, nor refer to any estate of Ferguson held in right of his wife, nor specify any property, except an alledged interest in a store, and some pecuniary demands hereafter to be noticed; but only pray for a discovery of estate, and for the subjection of such as may be discovered, we think it entirely clear that these bills present no obstacle to the title of the assignee in bankruptcy. The 38th and 39th sections of the execution law of 1828, do not, by fair construction, operate to give a lien upon the filing of every bill of discovery, of whatever nature it may be. And we remark with reference to the first, as well as the three last bills, that although it is the object and policy of the attachment laws, to give substantial aid to creditors resorting to the remedies which they furnish, there are still some other interests to be kept in view, and which creditors resorting to these laws are themselves bound to respect. A

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McCauley, &c. vs Rodes, Macklin &c.

due regard for these interests, requires that bills by which the defendant is to be restrained from disposing of property, of which, in the eyes of the community, he appears to be the owner, with the absolute right of disposition, should at least specify the property which without being actually taken into the custody of the law or its officer, is to be absolutely withheld from transfer, and tied up in the hands of the owner, by the silent and hidden operation of a *lis pendens*. The bill of discovery is given as a means of ascertaining secret or involved interests not open to ordinary observation. In the present case, the allotment of the land and slaves to the wife of Ferguson, were shown by the appropriate records of the county. His deed of trust had also been recorded near two years before these bills were filed. The means of specifying any or all of this property, were easily accessible. There was no need of a discovery as to that, and no excuse for the absence of specific allegation and description. And we think the complainants having neglected the obvious means of information and of certainty, are entitled to no aid by a favorable construction, either of their own vague allegations or of the statute, in their attempt to give a preference over other creditors.

We are satisfied, therefore, that the interest of Ferguson in the land and slaves, which had descended to his wife, was properly decreed to the assignee in bankruptcy.

With regard to the alledged interest of Ferguson in the store of G. B. Hale & Co., which all the bills, and the cross bill of the assignee seek to appropriate, we are of opinion, upon the bills and answers, that there was no such interest, either on the ground of fraud in the sale by Ferguson to Rodes and Macklin, or on the ground of agreement or trust. It appears clearly that they took Ferguson's interest in the store, upon the ascertainment of his insolvency, with great reluctance, and as a measure absolutely necessary to save them from loss on account of their engagements entered into at Ferguson's request, as sureties for the purchase of the goods. The transfer from Ferguson to them was absolute, without trust or condition. There was at the time no such inequality in the bargain, as either to create the inference of a secret

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trust or reservation which the parties positively deny, or to authorize the Chancellor to give that character to the transaction against the intention of the parties. Rodes and Macklin, for themselves, and in behalf of the creditors of Hale & Ferguson, were entitled in the disposition of the store, to a preference over all other creditors of Ferguson. There is little probability that if the business of the firm of Hale & Ferguson had been coercively closed for the satisfaction of creditors, any thing could have been realized for the separate creditors of Ferguson. The complainants, therefore, have lost nothing by the arrangement with Rodes and Macklin; nor have the general creditors of Ferguson, who are represented in this suit by the assignee; and although it be assumed that in consequence of the arrangement by which Rodes and Macklin took the place of Freguson, the new firm has, at their risk, and with their credit, and by good management, conducted a profitable business, this result thus accomplished, gives no enforcible right to Ferguson or to his creditors claiming through him, to demand a participation in the profits ultimately realized. The answers of the parties constitute an absolute negation of any such right as growing out of the transfer itself, and if it be supposed that in consideration of the good fortune which has attended the business, Rodes and Macklin may intend to bestow a part of the profits on Ferguson, or even if it be supposed that they so intended from the first, if the business should prove profitable, such a secret purpose not entering into the consideration of the contract of transfer, nor forming a condition in it, and not expressed nor even understood at the time, for all this is negatived by their answers, could not constitute a right in Ferguson. These remarks are made, not because there is any evidence of such intention other than may be inferred from the mere fact that Rodes and Macklin, took Freguson's interest and responsibilities reluctantly, and to save themselves, but because it is insisted on the part of the assignee, that his amended cross bill alledging such intention and averring that large profits had been made, was improperly rejected on his offer to file it, and that upon the statements of that bill, he was entitled to an account of the profits and to

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McCauley, &c. to Rodes, Macklin &c.

a decree. But the intention alledged in that bill is but an inference from the facts and relation of the parties as previously exhibited; and if those facts and relations are not such as to establish a right in Ferguson, as we are clearly of opinion they are not, the secret intention of Rodes and Macklin cannot do so. They had previously denied every material fact alledged in the amended cross bill, and its rejection was neither erroneous nor prejudicial to the assignee.

The bills and cross bills were, therefore, properly dismissed, so far as they sought relief against Rodes and Macklin.

Upon a fair construction of the agreement that the answer of Rodes should be taken as the answer of Hale, we think it should be taken as a denial of any indebtedness of Hale to Ferguson, and if not, he certainly should be allowed an opportunity to answer hereafter.

With regard to the few articles of personal property disclosed by Ferguson, in answer to the bills of discovery, as those bills did not of themselves, operate to attach them, they passed to the assignee; and no notice having been taken of them in the amended bills filed after the discovery made by Ferguson's answer, the inferrence is, that the complainants did not intend to pursue them further, but confined their efforts to the more important objects involved in the suit. What disposition has, in fact, been made of the property either by Ferguson or the assignee, does not appear. It is not mentioned in the decree, and not having been mentioned in any pleading of the complainants, we think they have no right to insist in this Court, for the first time, that it should have been subjected to their debts. They did not take the proper steps for having it so subjected, nor does it satisfactorily appear that they were entitled, at the final hearing, to a decree subjecting it.

Wherefore, the entire decree upon the original and cross errors is affirmed.

Combs & Shy for plaintiff; *Robinson & Johnson and Pindell* for defendants.

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Bray *vs* Howard, &c.

MOTION.

ERROR TO THE JEFFERSON CIRCUIT.

Case 122.

Limitation. Sureties in judgments, &c.

July 29.

JUDGE BIBB delivered the opinion of the Court.

Case stated.

RONALD, upon notice to Howard, Brooks and Nold, obligors in a replevin bond in the Jefferson Circuit Court, in favor of Bray, moved the Judge of said Court for an execution to issue on said bond for his use, in the name of the plaintiff. The Court overruled the motion and Ronald has brought the case to this Court.

It appears that McMichael, a deputy Sheriff, having in his hands an execution upon the replevin bond, some months after the return day, paid over the amount to Bray, the plaintiff, who gave his receipt for the same. McMichael returned upon the execution, that he had settled it in full with the plaintiff, but no part of it had been paid by either of the defendants, or any person for them. He afterwards assigned the execution to Ronald.

It further appears that the original judgment was rendered against Howard and Brooks, and that it was replevied by them with Nold as surety.

It was also proved upon the trial that Brooks was the surety of Howard on the note, upon which the original judgment was obtained.

The first question is, whether Ronald, in the state of case thus presented, was entitled to be substituted to the rights of the plaintiff in the replevin bond.

A sheriff who paid to the plaintiff in an execution the amount thereof, having become liable therefor by his official defalcation, has the right to be substituted to the right of the plaintiff, and in the name.

It was held by this Court in *Finn* vs *Stratton*, (5 *J. J. Marshall*, 366,) and is considered as the settled doctrine, that when the Sheriff has paid to the plaintiff in an execution, the amount thereof, having rendered himself liable therefor by his official defalcation respecting it, he has a right, by substitution, to occupy the place of the plaintiff, and should be allowed to use his name for making the money out of the estate of the defendants.

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BRAY
vs
HOWARD, &c.

of the plaintiff to be reimbursed his payment.

The proof in this case shows that McMichael had paid to the plaintiff the amount of the execution against Howard, &c. It appears to have been paid several months after the return day. There is no evidence that the execution, or any part of it, had been collected from the defendants or paid by them, nor does it appear that the execution had been returned within the time required by law. The presumption, we think is, therefore, authorized, that McMichael paid the amount of it to Bray, in consequence of his liability, resulting from official neglect in regard to it, and that he thereby acquired a right to the replevin bond and to use the name of the plaintiff in its collection. The right or interest thus acquired, passed by his assignment to Ronald.

The next question presented for consideration is, whether the case as to Brooks and Nold is embraced by our statutes of limitation, which were relied upon in the Court below.

A surety in a replevin bond is released by the failure of the plaintiff to sue out execution thereon for one year by the 19th section of the statute of 1838. (2 *B. Monroe*, 378.)

The execution upon the replevin bond returned by McMichael, was issued in August and made returnable in October, 1838, and no subsequent execution appears to have been issued. This proceeding, by motion, was commenced in 1846.

It is manifest, therefore, that the case as to Nold, is embraced by the 19th section of the act of 1828, (1 *Stat. Law*, 645,) according to the construction given to it by this Court in *Bank of the Commonwealth* vs *Patterson*, (2 *B. Monroe*, 378.) He was surety in the replevin bond, as appears upon its face, and no execution could issue against him.

Sureties are discharged from liability on *judgments*, injunction bonds, &c. when seven years shall have elapsed without execution, unless, &c. The terms *sureties in judgments* is construed to mean *sureties on bonds on which judgments* have been recovered.

The case as to Brooks, we think, is provided for in the first section of the act of 1838, limiting actions against sureties, (3 *Stat. Law*, 558.)

That act provides that sureties shall be discharged from liability on *judgments*, injunction, appeal, supersedeas, sale and replevin bonds, &c., when seven years shall have elapsed without execution on the judgment, unless delayed by dilatory proceedings on the part of the defendants. It is contended that the expression that sureties shall be discharged from liability on *judgments*, must

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mean *judgment bonds*. But we cannot concur in that construction. We are aware of no bond in this State, recognized in our statutes or known in common parlance by that appellation.

The Legislature, in our opinion, must have intended by the term judgments precisely what it imports, and by the expressions sureties in judgments, sureties in the notes or obligations upon which the judgments were rendered. It was the intention to provide for defendants in judgments, who were in point of fact sureties. Brooks was in this case the surety of Howard on the note, upon which the original judgment was obtained. He did not lose that character by becoming liable upon the judgment, nor afterwards in the replevin bond. He was still the surety of Howard, and had he been compelled to pay the money, would have been entitled to all the remedies against him which a surety has against his principal. It is true, that as between Howard and Brooks, defendants in the original judgment, and Nold, the former must be regarded as principals; but as between Howard and Brooks, the latter was still the surety of the former.

When seven years shall have elapsed after the rendition of the judgment, before any execution shall have issued, or when the same period shall have elapsed after the return of one execution before another issues, in both instances we think the statute applies.

When seven years elapse after judgment before execution, or when there is the same lapse of time between the issual of executions, the surety is released.

The statute is very comprehensive in its terms, and it seems clearly, we think, to have been the intention of the Legislature to provide, that a plaintiff in a judgment, who has slumbered without suing out execution for seven years, should after that time, as to defendants who were in point of fact sureties, be compelled to slumber on without remedy by execution or otherwise against them.

Seven years having in this case elapsed without execution on the judgment or replevin bond, the plaintiff was not entitled to one as against Brooks and Nold, and the motion for execution against all the defendants, was therefore properly overruled. As against Howard, Ronald is entitled to the benefit of the judgment, and to use the name of the plaintiff in its collection. And as the overruling the motion for an execution against all the

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ADDISON & CLENDENIN vs LOUISVILLE INSURANCE CO.

defendants will constitute no bar, and oppose no obstacle to proceeding against Howard, the judgment is affirmed.

Ballard for plaintiff; *Pirtle* for defendants.

COVENANT.

Addison & Clendenin *vs* The Kentucky and Louisville Insurance Company.

Case 123.

ERROR TO THE JEFFERSON CIRCUIT.

Insurance. Policy of Insurance.

July 29.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated,

THE plaintiffs in error having procured from the defendants an insurance to the amount of six thousand dollars, on a three story frame building situate in the city of Louisville, known as Atkinson's Mills, brought this action of covenant upon the policy, alledging the destruction by fire, of the property insured, and the refusal of the defendants to pay them the loss which they have sustained.

The interest which the plaintiffs had in the property at the time of the insurance is set forth in their declaration, and appears to have consisted in a lien to secure the payment of a debt on John Atkinson, for upwards of nine thousand dollars. The deed by which this lien is secured to the plaintiffs, also creates a lien upon the same property in favor of other individuals, to the amount of several thousand dollars, and places the creditors upon an equal footing, no debt having a preferance or priority given to it by the terms of the conveyance. The estate of the assured in the property, is expressed in the policy as consisting of a mortgage or lien thereon, and the policy purports to have been made for the purpose of covering the sum of six thousand dollars of their interest, but fails to set forth or express the additional incumbrances on the property, created by the same deed.

A demurrer to the declaration having been overruled, the defendants filed a plea, alledging in substance that the plaintiffs not having the legal title to the property insured by the policy, and only having a lien thereon with

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others named in the same conveyance, fraudulently failed to disclose to the defendants all the incumbrances on the property, and fraudulently failed to have all the incumbrances expressed in the policy, as required by the 13th section of the charter granted to, and incorporating the company, and of setting forth the names of the persons having the liens, and also alleding that the liens mentioned were existing liens at the date of the policy.

The plaintiffs having filed a demurrer to this plea, which was overruled, they filed a replication, admitting the existence of the alledged liens on the property at the date of the policy, and after denying that they fraudulently failed to disclose to the defendants all the incumbrances on the property insured, alledge that they did in good faith disclose their interest to the defendants at the time the policy was made, and after such disclosure the policy was issued in the shape in which it is presented to the Court.

The defendants having demurred to this replication, and the demurrer having been sustained, and the plaintiffs having determined to abide by their replication, and not to plead further, a judgment for the defendants was rendered by the Court.

The questions presented.

The right of the plaintiffs to a recovery against the defendants, depends upon two inquiries: First, was their interest in the property destroyed, such as authorized them to effect an insurance thereon? And if it were, is the instrument vitiated by the failure to have the additional incumbrances on the property insured specified and expressed in the policy itself?

The act to incorporate the Kentucky and Louisville Mutual Insurance Company, authorizes the company to insure all the real and personal property in the State of Kentucky, except books of accounts, written securities, or evidences of debt, title deeds, manuscripts or writings of any description, money or bullion, which articles not being deemed objects of insurance, the company are prohibited to insure. Chemical establishments, oil mills, alcohol, turpentine, and various other enumerated articles of the same description, are not deemed insurable,

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ADDISON & CLENDENIN vs. LOUISVILLE INSURANCE CO.

on account of their inflamable nature, and under the charter no insurance can be extended to them.

The property insured being an establishment for the manufacture of flour, it is not pretended that it is of a character which precludes its insurance under the charter; but it is urged that the owner alone could have it insured, and that persons having merely a lien on it, to secure the payment of a debt, have not such an interest as authorizes them to effect an insurance on the property.

Any individual having an estate in those erections which are insurable under the charter, whether it be a fee simple title to the property, or any less estate, may, according to the provisions of the charter, have the property insured, under the restriction alone, that the true nature and extent of the title, and all incumbrances affecting its value, be fully and fairly expressed in the policy. A lien upon real property to secure the payment of a debt, is clearly an interest therein vested in the creditor, and although it is only an equitable one, there is nothing in the charter which excludes the owners of equitable interests from the benefit of its provisions, or confines them to the owners of legal estates. We are, therefore, of the opinion that the estate which is created by a mortgage on real property, or by a deed giving a lien to secure the payment of a debt, is such an estate as under the charter authorizes an insurance on the property by the holder of the mortgage or lien, and that the plaintiffs had a right to have the property included in their policy insured, for the purpose of guarding against the loss of their debt by the destruction of the property bound for its payment. A debt is not itself, a proper object of insurance, neither is the title to the estate, or any interest which an individual may have in it, but the property itself may be insured, as a means of securing the assured by the preservation of the property, from the loss of his interest, whatever it may be.

The decision of the next point of inquiry depends on the provisions of the 13th section of the act incorporating the company. That act is in the following words:

"Said company may make insurance for any term not exceeding ten years, and any policy of insurance issued

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The Kentucky & Louisville Insurance Company, under their charter, may insure estate held by fee simple title or any less estate, but the nature and extent of the estate of the interest insured must be set forth fully & fairly, in the policy, together with every incumbrance calculated to affect that interest, otherwise the policy is invalid.

by said company, signed by the President and countersigned by the Secretary, shall be deemed valid and binding on said company in all cases where the insured has a title in fee simple, unincumbered, to the building or buildings insured, and to the land covered by the same; but if the insured have a less estate therein, or if the premises be incumbered, the policy shall be void, unless the true title of the assured, and the incumbrances on the premises be expressed therein."

The policy obtained by the plaintiffs contains no specification of the other co-existing liens on the property, and the question arises whether this provision in the charter applies exclusively to the case of an insurance by the legal title holder, or whether it applies to all cases where an insurance is effected. Every reason which requires the legal title holder to state the nature and condition of his title, and the existing incumbrances on the property, and to have them expressed on the face of the policy, applies with equal force and urgency, to those who do not own the property absolutely, but only an interest in it. And when the extent of that interest is liable to be affected as in the present instance, by other co-existing liens, which may have the effect of reducing the actual value of the interest of the assured in the property embraced in the policy, even below the sum for which the insurance has been obtained, the propriety of the requisition becomes perfectly obvious. The position is not correct that merely the incumbrances on the interest or title of the assured should be made known and expressed in the policy. Every incumbrance on the property which, by its operation, necessarily affects the extent and value of that interest or title, must be expressed. The reason of this is perfectly evident. The amount of an insurance is regulated by the value of the interest of the assured in the property. Good faith, therefore, requires that every thing known to the assured affecting that value, should be fully disclosed and communicated to the insurers.

As the charter explicitly declares the policy void unless the incumbrances on the premises be expressed on its face, and as other incumbrances existed on the property

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Jennison & Clendenin vs Louisville Insurance Co.

insured, besides that held and owned by the plaintiffs, created by the same conveyance, consequently known to them, and calculated seriously to affect the extent of their interest, of which no mention is made in the policy, it results that it is void under the charter, unless the plaintiffs, by their replication, have manifested some reason why the defendants should be liable notwithstanding this omission in the policy.

If the circumstances be fully disclosed by the insured, and left out of the policy by fraud, ought not the insurers be liable at least in equity? Qua.

Had the replication alledged a full disclosure to the defendants, of the nature of the plaintiffs' title to the property and of the other liens existing upon it, calculated to affect their interest, and a failure on the part of the defendants to insert it in the policy issued by them, it might form a very serious and important question whether under such circumstances, inasmuch as the defendants make the policy themselves, an omission on their part to insert in it every fact disclosed by the assured, which was necessary to its validity, should not be regarded as fraudulent, and their liability as existing, if not in a Court of law at least in equity, notwithstanding such fraudulent omission. But as the plaintiffs do not alledge in their replication, that they disclosed to the defendants the existance of the other liens upon the property, but only alledge that they, in good faith, disclosed the nature of their own interest, which fact is shown by the policy itself, this question is not presented by the pleadings, and consequently is not now decided. As the deed creating the liens formed a part of the plaintiffs' declaration, and showed that other liens had existed on the property, besides that of the plaintiffs, which must necessarily have been known to them, and were not expressed in the policy, the declaration itself would have been bad, had it shown that those liens were valid and subsisting at the date of the policy. This fact is alledged by the defendants in their plea, and admitted by the plaintiffs in their replication.

Inasmuch, therefore, as the policy sued on is void for failing to mention on its face the co-existing liens on the property insured, and as the plaintiffs have failed to plead any fact which forms a legal excuse for this omission, it

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follows that the judgment of the Court below sustaining the demurrer to their replication is correct.

Craig vs Hewitt.

Wherefore, said judgment is affirmed.

Duncan and Ripley for plaintiffs; *Guthrie* for defendants.

Ramey *vs* Thornberry.

Case.

Error to the Pike Circuit.

Case 124.

Slander. Words held actionable.

Judge Breck delivered the opinion of the Court.

July 30.

That R. swore a lie in the Pike Circuit Court on the trial of the Commonwealth against D. is actionable; being a charge of false swearing before a judicial tribunal.

The words charged in the declaration, that "Ramey swore a lie in the Pike Circuit Court, on the trial of the Commonwealth against Davidson Mays," we think were actionable.

To charge a person in general terms, with having sworn a lie or having sworn falsely, is certainly not actionable. But here the words very clearly import a charge of false swearing in a judicial proceeding, and before a tribunal competent to administer an oath. In view of our statute defining, in effect, what shall constitute perjury, the words as laid, import substantially a charge of that kind.

It results that the declaration was sufficient and the demurrer improperly sustained.

Wherefore, the judgment is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings.

McKee for plaintiff.

Craig *vs* Hewitt.

Chancery.

Error to the Franklin Circuit.

Case 125.

Usury.

Judge Simpson delivered the opinion of the Court.

July 30.

This being a suit in chancery brought to reclaim usury alledged to have been paid, it is contended that the com-

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CRATO vs HEWITT.

plainants bill is defective and does not authorize any decree in his favor, the transaction which it sets forth not being such as the law deems usurious.

Case stated.

The bill alledges that the complainant was indebted to the defendant in the sum of two thousand dollars and upwards, due on the first day of March, 1844, for which sum the defendant had obtained a judgment at law, and to secure its payment, the complainant had given him a mortgage on his tract of land. That afterwards, in the spring of the year 1845, he sold the same tract of land to a man by the name of Wilson, and sometime thereafter, procured Wilson to execute his note to the defendant for the sum of two thousand three hundred and forty four dollars and forty nine cents, being the full amount of the judgment at law, including the debt and ten per centum per annum interest thereon, from the time it was due, and the costs of the common law suit; which note the defendant accepted in payment of his demand against the complainant, and for which sum the complainant gave Wilson a credit on the amount due by him for said tract of land, and that thereby he had paid the defendant one hundred and twenty dollars usurious interest.

Whether a contract to receive more than legal interest be upon the loan of money, or for the forbearance of a debt due, it is usurious: 5 *Littell*, 85.

Whether a contract for illegal interest be upon the loaning of money or for the forbearance of a debt due, it is still usurious within the meaning of the statute: *Skinner* vs *Miller*, (5 *Litt.* 85.) But it is contended inasmuch as the complainant does not alledge the interest to have been paid upon a contract for its payment, that although the collection of the debt had been forborne, and in its final adjustment and settlement between the parties, interest beyond six per cent. per annum was paid, that it cannot be regarded as usurious, it not appearing to have been paid on any previous contract or agreement, but merely for past forbearance.

—If the facts be set forth which constitute a usurious transaction the Court will draw the legal conclusion: 6) *Monroe*, 81; 7 *Ib.* 263; 1 *J. J. Marshall*, 11.)

To constitute usury, it is undoubtedly necessary that there should be a contract upon which it is paid, either upon the loan of money or for the forbearance of a debt due, which is substantially a contract to lend it for a longer time. But if the facts which constitute usury are set forth, it is sufficient, and the legal conclusion will be made by the Court: (6 *Monroe*, 81; 7 *Monroe*, 263, *and*

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1 *J. J. Marshall*, 11.) Here the existance of a debt due, its forbearance for eighteen months, and its payment with ten per cent. per annum interest thereon, from the time it fell due, are the facts set forth by the complainant. Is not the existance of a previous contract to pay usury necessarily implied from the fact of its payment? Any other doctrine would open a wide door for the introduction of shifts and subterfuges, for the evasion of the statute. Besides, the evidence proves the fact to be that there had been a contract between the parties for the payment of interest at the rate of ten per cent. per annum, and that the settlement was made in accordance with their previous agreement and understanding on the subject. The complainant's bill would have been more formally correct, had it expressly alledged, that the usury had been taken on a contract for the forbearance of the debt; but as it charges the facts from which the legal implication of such a contract necessarily arises, it cannot be deemed so defective as to preclude the complainant from relief, provided he is entitled to it on the merits of the case, as presented in his details of the transaction.

The Chancellor will regard the substance of a transaction rather than its form.

The defence, however, is rested mainly on the ground that the transaction itself is not illegal and usurious. That it was not a payment made by the complainant, but a purchase of the debt by Wilson; and the fact that the defendant transferred to Wilson the mortgage and the judgment, it seems is relied upon to prove that this was its true character. But any deduction that might be made from that circumstance favorable to this conclusion, is repelled, not only by the intrinsic improbability that any such transaction occurred as that contended for, by which an individual is made to purchase a judgment, not at a discount, but at a very considerable advance; but also by the proof of Wilson, that he executed his note to the defendant at the instance of the complainant, who gave him a credit for the amount on what he owed him, and by the additional circumstance, that the defendant on the final adjustment of the debt, and the reception of Wilson's note, surrendered to the complainant the note that he held on him, having first written on it the words, paid in full. The assignment of the mort-

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NAYLOR vs HAYS.

gage may be explained and accounted for on the supposition, which is altogether reasonable, that Wilson having substituted his own note for that of the complainant, was desirous of having the mortgage on the land he had purchased released, and the incumbrance removed, and that the transfer of the mortgage to him was made for the purpose of effecting this object.

The substance of the transaction between the parties is, that the complainant being indebted to the defendant, procured Wilson, his debtor, to pay the debt and ten per cent. per annum interest thereon for him to the defendant, which he did by the execution of a note that he has since paid off, and that Wilson, for the sum so paid by him, has obtained a credit on the debt due by him to the complainant. So that the debt, although paid by Wilson, was in fact paid out of the complainant's means, and was in substance and effect a payment by him. Wilson has not lost the ten per cent., the credit which he obtained was for the full amount paid by him. The loss has been incurred by the complainant, and as we consider the transaction to be usurious, he alone has the right to reclaim the usury received by the defendant.

Wherefore, as the Court below refused the complainant relief, and dismissed his bill, the decree is reversed, and cause remanded, that a decree may be rendered in favor of the complainant in conformity with this opinion.

Harlan & Craddock for plaintiff; *Hewitt* for defendant.

TRESPASS.

Case 126.

Naylor *vs* Hays.

ERROR TO THE BARREN CIRCUIT.

Master and slave. Estoppal.

July 31. JUDGE SIMPSON delivered the opinion of the Court.

Case stated. THE plaintiff in error having in his hands as Constable, an execution against Dick Hays, a man of color, and having sold, in satisfaction thereof, various articles of personal property, an action of trespass was brought against

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him by the defendant in error, for the property seized by him and applied to the payment of the execution.

It appeared upon the trial, that the defendant in the execution had been the slave of the plaintiff, David Hays, *Sen.* That many years previously, the slave and his master entered into a written agreement, and deposited it with the witness, stipulating for the freedom of the slave, upon the payment of a certain sum, the amount of which was not recollected by the witness. That the writing was some time thereafter surrendered to the parties, and nothing had been known of it since. It was also proved that for eight or ten years before the trial, Dick had been going at large, trading for himself, and in every respect acting as a free man, the plaintiff not exercising any control over him, nor doing or saying any thing which indicated that he was still his slave; but on the contrary, declaring that he had nothing to do with *him*, and using language calculated to create the impression that he was free.

A master permitted his slave to go at large, trade and act as a free man, declaring that he had nothing to do with him. Held that the master could not, as to strangers who are not apprized of the fact that he was a slave, claim the property made and possessed by the slave, or maintain an action against a public officer for levying on the property of the slave.

We are clearly of the opinion, that upon this evidence, third persons, who were strangers to the relations actually subsisting between the plaintiff and Dick, had a right to rely upon the conduct of the plaintiff as creating a presumption of Dick's freedom, and as estopping him from denying the fact, so far as they were concerned, unless he made it appear that they knew at the time they dealt with Dick as a free man, he was in reality a slave.

If he were still a slave, and had never been emancipated, the conduct of the master was a palpable violation of the law, and to permit him under the circumstances, to hold others to an accountability as if Dick were a slave, whilst he was treating him as a free man himself, would enable him to take advantage of his own wrong, and thereby perpetrate a gross fraud upon the community.

On the other hand, if an individual should deal with a slave, knowing him to be a slave, he should not be permitted to vindicate the act, or shield himself from the consequences of its illegality, by relying upon the illegal conduct of the master. Although even in such a case, in a contest with the master for property sold by the slave, the conduct of the master might be relied upon by the

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purchaser, as evidence of agency in the slave, and an authority to make the sale.

Under the act of 1800, slaves may be emancipated by an instrument of writing, without any particular formality, and the act of recording is not necessary to the validity of the emancipation: (2 *J. J. Marshall*, 230.) The master, therefore, not being required to do any act in emancipating a slave, which will operate as a public notice of what he has done, and having it in his power to emancipate by the secret execution of an instrument of writing, which by collusion between him and the person whose freedom it secures, may be brought forward or withheld at pleasure, should not be permitted in opposition to the fair presumption arising from his own conduct, upon such a state of fact as this case presents, to prove, so far as the rights of innocent parties are concerned, that the relation of master and slave still exists.

The consequence of this doctrine is, that upon the evidence exhibited, the trial in the Court below should have been conducted and governed by the same rules of law that would have been applicable to the case, if the defendant in the execution had been a free man; the plaintiff's right of recovery not being made to depend upon the question of slavery, but upon his right to the property, and the liability of the defendant under the circumstances proved, independant of that fact.

The instructions of the Court below to the jury being inconsistent with the principles contained in this opinion, were erroneous.

Wherefore, the judgment is reversed and cause remanded, that a new trial may be granted, and for further proceedings in conformity with this opinion.

Underwood for plaintiff; *Craddock* for defendant.

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Gibson *et al.* *vs* Armstrong; and Armstrong *vs* Gibson *et al.*

ERROR TO THE MASON CIRCUIT.

Church case. Deed. Trusts.

CHANCERY. 7bm 481 112 523, 7bm481 113 80

Case 127. 7bm 481 129 393

July 27. 7bm481 e131 476 f131 479

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THIS record presents a contest between two portions of the former congregation of members of the Methodist Episcopal Church at Maysville, each claiming, as a distinctly organized society or congregation, the exclusive use and control, for the purposes of worship, of the Methodist Meeting House or Church building, and the lot on which it is situated, in the city of Maysville. The opposing claims of the two parties, were brought into immediate conflict, by appointments made and published, under different authorities, for preaching and Divine worship, at the same hour of the same day, and in the same Church, by two different preachers, for each of whom the parties respectively claimed the use of the pulpit. To prevent collision and with the intent that the house should not be occupied at all, on the day referred to, John Armstrong, one of the original trustees to whom the lot had been conveyed, and holding also other official stations in the collective Church at Maysville, and being the representative of one of the contending parties, had the house fastened up; but other and more numerous officers and trustees of the other party, had the doors opened, and occupied the Church, with their preachers.

The complaint in the bill of Armstrong, of expulsion from the Church at Maysville, and claiming the exclusive use of the same for the 'Methodist Episcopal Church in the U. States,' in virtue of the deed and as trustee.

In this state of things, John Armstrong, in behalf of himself and others acting with him, filed this bill, complaining in effect of a forcible expulsion from the house, claiming that he and his associates, as members of the Methodist Episcopal Church, in the United States, were, together with their preacher, entitled by the terms of the deed under which the lot was held, and the building erected, to the free and undisturbed use of the house, but that the opposite party having renounced the authority of

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GIBSON *et al.* vs ARMSTRONG, &c.

the Methodist Episcopal Church in the United States, and entered into a new and distinct organization, under an independent jurisdiction, known as the Methodist Episcopal Church South, were no longer members of the Methodist Episcopal Church in the United States, and therefore, had no rights under the deed. And he invokes the aid of the Court, for maintaining the objects and provisions of the deed, and securing to himself and associates the exclusive use of the Church at Maysville.

The defence of the remaining trustees and others to the claims of complainant, denying their exclusive right as claimed, or any right to the use of the Church building, and claiming the exclusive right for their organization under a recommendation and act of the General Conference of the M. E. Church in the U. States in 1844, and the act of the Ky. Conference in 1845, and the Maysville Church, in obedience to said recommendation and insisting that their occupation of the Church was consistent with the deed.

The defendents, consisting principally of the four remaining trustees, and several other officers of the collective Church, not only deny the exclusive claim set up in the bill, but deny to the complainant and his associates, as an organized body or congregation, all right to the use of the Church building at Maysville, and claim the exclusive right for themselves and associates; alleging, that at an unusually large meeting of the Methodist Episcopal congregation at Maysville, held after due notice, under the authority of the General Conference of the Methodist Episcopal Church of the United States, and in pursuance of the recommendation of the Bishops of the Church, a clear majority of the members present, voted for adhering to the Methodist Episcopal Church South, which had been organized under the authority of said General Conference, whereby, and by the ascertained concurrence of so many of the absent members, as made, with the said majority of those present, a clear majority of all the members of said congregation or society, the Maysville society was, by the terms of the resolutions passed by the General Conference of 1844, and under their authority, lawfully placed in connection with the Methodist Episcopal Church South. They claim, therefore, that they as members of the Maysville society or Church, with their preacher, authorized by the Kentucky Annual Conference, with which the Maysville society had long been connected, are entitled to the uses provided in the deed, and that the minority having separated themselves from that society, and formed an independent Church or congregation, in opposition to the authority of the Kentucky Annual Conference, and without the sanction and in violation of the resolutions of the General Conference of the entire

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Church, their claim to the house was contrary to the provisions of the deed, and to the rules and discipline therein referred to; and that their preacher sent from the Ohio Annual Conference, had no right under the deed and the rules and discipline, to the use of the pulpit in the Church at Maysville, which, according to the pre-existing organization, belonged to the Kentucky Conference, and should receive its preacher from that source, and not from the Ohio Conference, unless under the resolutions of the General Conference, the Maysville society had, by the vote of a majority, beeen detached from the Kentucky Conference.

The complainant also claims the majority to be with his party; but he and his associates rely mainly on the ground already stated, and which is elaborately urged in an able argumentative replication, in which they insist on their continued membership in the same Methodist Episcopal Church in the United States, into which they first entered, and to whose members the use of the property was secured by the deed, and charge that the other party having united itself with a different Church, its members do not come within the description of the beneficiaries in the deed, as members of the Methodist Episcopal Church in the United States. They also deny that the General Conference of 1844, had power to divide the Methodist Episcopal Church, or to dispose of the property secured to its members in the use of their preaching houses, or to dispose of the members themselves by attaching them, against their will, to the anticipated southern organization, or to sanction a division of the Church in its membership, property, or authority. And they further maintain that if the resolutions of that body passed for that purpose, and relied on by the defendants, be valid and binding on the Church, the terms and conditions therein prescribed, have not been complied with so as to legalize the action and independent organization of the Southern Conference, or to afford protection or secure rights to that organization.

Complainants deny in their replication that the majority of the Church at Maysville is with the defts., and insist that the defts. have separated from the M. E. Church, and are no longer the beneficiaries entitled under the deed—deny the authority of the General Conference to divide the M. E. Church or dispose of the property secured to the Church in houses of worship, or to dispose of the members against their will to a Southern organization; and that the recommendation of Conference, if legal, has not been complied with.

Notwithstanding the exclusive right thus asserted and insisted on by each party, the Circuit Court being of opinion that as this was a case of schism or division, not

The decree of the Circuit Court dividing the use of the Church un-

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GIBSON *et al.* vs ARMSTRONG, &c.

der the statute of 1814. (*Stat. Law*, 1347.)

caused by immorality, the first proviso in the act of 1814, "for the benefit of religious societies." (2 *Stat. Law*, 1347,) prescribed the rule of apportionment according to numbers, and finding the parties to be nearly equal in numbers, decreed the alternate use of the house for one week at a time, to each party in succession. From this decree each party has appealed, each claiming, in this as in the Circuit Court, that under the true construction and application of the deed, the exclusive use is secured to itself, and that the statute prescribed no rule for the case.

The proviso in the statute of 1814 was not intended to control the operation of deeds or affect permanently the rights of beneficiaries in deeds for Church property, or restrict the powers of Courts of equity in ascertaining and enforcing the rights according to the true intent of the deeds conferring the rights.

I. We shall first consider the question as to the application and effect of the proviso. Conceding that the body of the statute applies not only to such religious congregations or societies as are completely independent, but also to such as may be under relations of dependence and connection as parts of a larger system, and that whenever a lot has been conveyed to trustees for the benefit of a congregation or society of either sort, for the purposes mentioned, the succeeding trustees, regularly chosen and having their names recorded in the County Court, are by the statute, invested with the legal title and with the powers expressly enumerated, subject to the proviso; still the proviso declares nothing more than that the act shall not be construed to authorize the said trustees, in case of schism or division, not caused by immorality, to prevent either of the parties from using the house erected on the lot, for devotion, a part of the time, proportioned to the numbers of each; and we are satisfied that it was not intended to control the operation of the deed, or to affect permanently, the rights of the beneficiaries, or to restrict the powers of a Court of equity in ascertaining and enforcing those rights according to the true intent of the deed by which they were conferred. The manifest object of the statute is to uphold the uses declared in the deed, by enabling the society to effect in an easy mode, the transmission of the title from the original trustees to others chosen as occasion may require. It cannot be supposed that as a consideration for this privilege, the Legislature intended to assume, in case of schism, the absolute disposal of the use itself, by the establishment of a

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rule which might, in many instances, defeat the obvious intent of the deed. The proviso does not imply such an interference with the trust; and to give to it such an effect by construction, would be carrying it not only beyond its literal import, but beyond any reasonable motive for its enactment, and perhaps beyond the competency of the legislative power. As the statute not only invests the trustees chosen under its provisions with the legal title, but also empowers them to do any act "which may be necessary for the use aforesaid," it seems to have been a necessary precaution to prohibit them in cases of a division, in which they might be identified with one of the parties, or might be otherwise incompetent to determine the right, from preventing, by their own action, either party from occupying the premises for devotion. So far as the trustees were authorized to act, they were to regard both parties as being entitled to the use, and as in such a case the rule of apportionment according to numbers, is obviously just, the trustees were prohibited from using their authority under the statute, to prevent either party from a proportional use.

This is, in our opinion, the true extent and operation of the proviso under consideration. It prohibits the trustees in cases of division referred to, from shutting the door at their own discretion against either party. It prohibits them probably from expelling either party by an action at law, in which the legal title might prevail without regard to the equities of the case. It may perhaps prohibit them as mere holders of the legal title, and of the powers vested by the statute, and not being beneficiaries, from obtaining relief even in a Court of equity, in favor of one of the parties to the exclusion of the other. But it does not prohibit the persons claiming as beneficiaries under the deed, from appealing to that Court for the establishment of their right against opposing claimants under the deed. Nor does it prohibit the Court, in a case properly before it, from deciding the right, as it is bound to do, according to its opinion of the true construction and operation of the deed under which it is derived. In such a contest, the trustees as holders of the legal title, need not be complainants. It is sufficient that they be

—The proviso was intended to prevent the trustees in cases of schism, from excluding either party from the Church, or perhaps from expelling them, even by an action at law; but it does not prohibit the application of either party, being beneficiaries, from an application to the Chancellor for the establishment of their right against other claimants under the deed, which they are bound to do. The trustees are sufficiently before the Court by being defendants to the suit between those claiming as beneficiaries under the deed.

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GIBSON *et al.* *vs* ARMSTRONG, &c.

Curd vs *Wallace*, (7 *Dana.*)

made defendants. The Court, with the legal title and the adverse claimants before it, can perform its office fully, and secure the appropriate relief without the aid or action of the trustees. Whatever, therefore, may be the extent of the restriction imposed by the proviso upon the exercise by the trustees of the rights or powers conferred on them by the statute, it does not prescribe any peremptory or universal rule for determining a contest between contending parties claiming the benefit of the deed.

Shannon vs *Frost* (3 *B. Monroe*, 253,) cited and approved.

The foregoing views are in substantial accordance with the construction given to the proviso in the case of *Curd* vs *Wallace*, (7 *Dana*, 190,) in which it is said the proviso gives no right to either party which did not otherwise exist. And although in that case the rule of apportionment was adopted, this seems to have been done upon the assumption that the suit could only be sustained under the authority conferred by the statute, whence it was concluded that the relief obtained should be subject to the restriction of the proviso. But under the authority of the subsequent case of *Shannon* vs *Frost*, (3 *B. Monroe*, 253,) this assumption must be regarded as entirely overruled, or as being restricted to the particular circumstances existing in the case of *Curd* vs *Wallace*.

A construction given to the statute of 1835, (3 *St. Law*, 499.)

In the case of *Shannon* vs *Frost*, the Court following, as we think, the precedents and practice of a Court of equity, granted relief upon a bill filed by a committee suing in behalf of a congregation, to protect it from disturbance by expelled or schismatic members, and the trustees were made defendants. Then an act of 1835, (3 *Stat. Law*, 499,) authorizes any religious society to appoint a committee or trustees upon its own record book, and without conferring on them the legal title or imposing any restriction, authorizes them to enforce by suit, any claim of the society to property, and to recover for damages done to it, &c. It is obvious that a religious society may obtain, by proceeding under this statute, substantially the same advantages for the protection of their property, as by proceeding under the act of 1814. And looking to both of the statutes and to the two cases which have been referred to, we conclude that no substantial right is lost or gained to the beneficiaries by proceeding

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under one instead of the other. And that in all cases of this character, the real question is, whether the deed when applied to the facts, furnishes a sufficient and safe basis for judicial discrimination between the parties.

The bill being filed by one of the original trustees named in the deed for the Church property on behalf of himself and his associates, and others of the trustees, claiming to be beneficiaries, being defendants, the rights of the parties interested are properly before the Court.

In the case before us, the bill, as already stated, was filed by one of the original trustees, sueing for himself and his associates. The case is therefore not directly within the authority of *Curd* vs *Wallace*, where the trustees deriving authority from the act of 1814, were complainants. Two other persons named as trustees in the deed, who with the complainant, are the only survivors, are made defendants. The trustees appointed by the undivided society, and by each party since the division, are also defendants, so that the legal title in whomsoever it may be, is before the Court. The appointment of all of these trustees, except those named in the deed, has been made since the passage of the act of 1845. But although we suppose the legal title to have passed to such of them as were appointed by the proper authority, and had their appointments recorded in the County Court, the proviso in the act of 1814, has, in our opinion, no operation on the case, unless under the deed each of the parties, or one as much as the other, is entitled to partipate in the use. No question is made as to the competency of the parties to represent the claimants on either side, and we regard the case as fairly presented for decision on the merits of the respective claims under all the considerations which should bear upon the question in a Court of equity.

The provisions of the deed for the church property, 1st. For a house of worship for the use of the members of the M. E. Church in the U States of America, &c.

II. We proceed, therefore, to the inquiry, whether under a proper construction of the deed, as applied to the existing state of things in the divided Church, each of these parties is entitled to participate in the use of the property in question, or whether one alone, and if so, which one is entitled to the use in exclusion of the other. The consideration urged upon us, that this inquiry involves not merely the title or use of the Maysville Church building, as contested in the present case, but also the title to a large amount of other property within the limits of the Southern organization, referred to in the pleadings, gives to the present investigation and decision, an

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GIBSON *et al.* vs ARMSTRONG, &c.

importance which will justify a more detailed statement of facts and argument, than would otherwise be allowable in a judicial opinion.

The deed under which both parties claim, pursues strictly the form prescribed or recommended for general use in the book of discipline of the Methodist Episcopal Church, as early as 1796. It was executed in 1812, and for the consideration of fifty dollars, paid to the grantor, conveys to five named trustees and their successors forever, a designated lot or parcel of ground in the town (now city) of Maysville, upon the following trusts, (which we number for convenient reference:)

1st. That they will erect or cause to be erected thereon, a house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and discipline, which, from time to time, may be agreed on and adopted by the ministers and preachers of said Church, at their General Conferences in the United States of America.

2d. And in further trust and confidence, that they shall, at all times, permit such ministers and preachers belonging to said Church as shall, from time to time, be duly authorized by the General Conference of the ministers and preachers of said Methodist Episcopal Church, or by the Annual Conference authorized by the said General Conference, to preach and expound the holy word of God therein.

3d. And in further trust and confidence, that when one or more of said trustees shall die, or cease to be a member of said Church, according to the rules and discipline, then it shall be the duty of the stationed minister or preacher, (authorized as aforesaid,) who shall have the pastoral charge of the members of the said Church, to call a meeting of the remaining trustees, &c. &c.; and the vacancy is to be supplied by choosing in the designated mode, one or more persons, who shall have been a member or members of said Church for one year.

4th. Provided, that in case the trustees or any of them, shall be bound for any sum of money on account of said premises, and obliged to pay the same, they are authorized to raise it by mortgage or sale of the premises, after

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notice given to the pastor or preacher who has the oversight of the congregation attending divine service on the said premises; and any surplus arising from such sale, is directed to be placed in the hands of the Stewart of the society belonging to or attending divine service on said premises, to be disposed of by the next Annual Conference, according to its best judgment, for the use of said society.

The two first clauses have been copied literally, and of the two others, of which the substance is stated, such expressions are retained as are supposed to be in any degree illustrative of the previous portions and of the intended operation of the entire instrument.

In reference to a question arising incidentally in the case, we remark that the phrase, "the said Church," used three times in the third clause, evidently means, in the second instance of its use therein, the local Church or congregation worshiping on the premises, of whose members alone the stationed preacher has the pastoral charge; and we think the same meaning should be given to the same words in the first and third instances of their use in the same clause. From this construction it follows that a trustee might be regarded as vacating his office by ceasing to be a member of the local Church, of which he was a trustee, and that his place might be filled according to the third clause of the deed, although he took membership in the local Church of some other place, and in that way continued to be a member of the Methodist Episcopal Church.

The terms "the said Church," used in the second clause of the deed, evidently means the local Church worshiping at Maysville. And a trustee would loose his powers as such, by ceasing to be a member of the local Church of which he was a trustee, although a member of the M. E. Church located elsewhere.

It should be stated as essential to a proper understanding of the deed, and to a correct application of its terms to persons and things, that the funds for purchasing the lot and erecting the buildings thereon, were furnished in the first instance, by the Methodists residing in and near Maysville, and by some few others for their use, and that such as have been since found necessary, have been furnished, probably by the members of the congregation which attended divine service on the premises.

1. The first proposition which we deduce from the deed and the facts connected with its execution, is that the grantor was not the donor of a charity, but the vendor of

The grantor in the deed for Church property, was not the donor of a charity;

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GIBSON *et al.* vs ARMSTRONG, &c.

but the vendor of land for a consideration paid, and therefore the estate can never revert, tho' the M. E. Church should cease to exist; but the use belongs to the local society worshiping at that place, unless forfeited by a departure from the conditions of the deed.

land in fee, for a consideration paid, and that consequently, there never can be a reverter of the estate to him or his heirs, though the uses should wholly fail, and the Methodist Episcopal Church be utterly subverted and extinguished. The last clause of the deed shows that upon a sale of the premises, though involving perhaps their total alienation from the uses declared, the surplus is to be disposed of, not for the purpose of reimbursing the donations made, nor for the direct benefit of any individuals, but for the use of the local society belonging to or attending divine service on the premises. Whence it may be inferred that so long as that local society remains and can be identified, the uses of the deed will not fail, but will still pertain to that society, unless forfeited by its departure from the conditions of the deed.

The import of the deed is, that the use and occupancy of the Church is to be for the accommodation of the local congregation or society at Maysville, tho' subject to the rules and regulations prescribed by the higher authorities of the M. E. Church—Members of the M. E. Church at large can have no other use of the local premises; but through the instrumentality of the local society, and in subordination to the Church at large.

2. A second proposition arising from the very nature and circumstances of the case, and demonstrated by the features of the deed and other considerations just referred to, is that notwithstanding the apparent comprehensiveness of the terms in which the use is declared in favor of the members of the Methodist Episcopal Church in the United States, the actual use, that is, the use of the premises by occupancy and for accommodation, and the immediate control of them as a place of worship, was intended to be secured to the local congregation or society subject to the rules and regulations prescribed by the higher authorities of the Church. The primary object of the whole transaction must necessarily have been to provide and secure a place of worship according to the Methodist Episcopal discipline, for the local society, (of that denomination,) by and for which the contributions were made, and which was expected to attend worship on the premises. It is to such society and its members alone, that the first clause of the deed secures any proprietary right or any tangible interest which can be the subject of adjudication by the civil tribunals. The members of the Methodist Episcopal Church at large, not belonging to the local society, can, in a general view, have no other use of the local premises but through the instrumentality of the local society, and by means of the subordination of the local use to the laws and authority of the

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Church at large. This use is doubtless within the provisions of the deed, and cannot be disregarded by the Court, but it is to be maintained not as an independent right, but only by maintaining the use in the local society, according to the laws of the Church. Any right of temporary participation in this local use which courtesy or usage, or even the rules and discipline may allow to a visiting member from a different local society of the same denomination or general Church, can scarcely be regarded as forming an exception to the general proposition which we have asserted. We perceive no ground on which the civil tribunal could interpose for the enforcement of such a right against the local society. Although the trust is declared to be for the use of the members of the Methodist Episcopal Church in the United States, whence it might be inferred that membership of the general organization of that Church, alone gives the right, yet that membership is itself acquired only by a membership in some local society connected with the general organization and forming a part of it. It is, in fact, the local society worshiping at the place, that is entitled to the use, and individuals are entitled only as members of, and in subordination to the society, to which in its organized form and in subjection to the rules and discipline and general legislation of the Church of which itself is a part, belong the immediate use and control of the local premises. Any dispute between individuals and the society in regard to the fact of membership, or the rights pertaining to that relation, must present an ecclesiastical question, of which the decision by the tribunals of the Church would, in general, be regarded as final by the civil power.

In case of a division of the local society, each claiming the use, their rights must be decided by rules of the Church, in which no right is perceived in a separating minority to claim the use against the majority maintaining the original organization.

3. In case of a division of the local society into two organized parts, though the individuals of each party might still answer to the general description of the beneficiaries as contained in the deed, it does not follow that each party would be entitled to the use of the house of worship. For the members of each distinct society of the same denomination might come equally within the general description, and most obviously no one of these societies could, upon that ground, claim to oust any other from the use of its own house of worship. But as under

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GIBSON *et al.* vs ARMSTRONG, &c.

the propositions which have been advanced, the use belongs, in subordination to the rules and discipline, to the local society, and to individuals as members of it, the title to the use, so far as it depends on this first clause of the deed, must, in case of a divided society, be determined by the question which of the two contending bodies is entitled, according to the rules and discipline, and the laws of the Church which they authorize, to be regarded as the true society or as a continuation of the society by which and for whose use the lot was purchased and the building erected and held. We do not say that there could be no case of the friendly and authorized division of a local society, when each party being recognized by the other and by the higher authorities of the Church, might by mutual agreement or otherwise, be entitled to participate in the use which had belonged to the entire society. But with such knowledge of the rules and discipline and laws of the Methodist Episcopal Church as our investigation of the present case has brought to us, we feel authorized to say that next to the diffusion of christian faith and morals, they have in view the preservation of union, and harmony, and order and subordination throughout every part of the great association for whose government they were intended. And we discover in them no sanction for the idea that a minority of one of the societies of the Church separating itself from the major or organized portion, and assuming, at its own mere will, a new and independent organization, can in its corporate form, claim any right of occupying their former house of worship, against the will of the remaining body, which retaining the original organization with the same officers and head or their regularly appointed successors, and preserving the same position in the general organization, has in point of fact, and in view of the law, these satisfactory evidences of its being the true society entitled to the use. Certainly the separating portion could not, by its own mere will, nor by assuming an internal organization conforming to the rules and discipline and usages of the Church, nor by placing over itself a preacher of its own choice, nor by claiming to be the true and only society of the Methodist Episcopal Church belong-

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ing to the place, become *ipso facto* an organized portion of the general body or Church. Until recognized by the proper authority of the Church and taken into the connection according to its laws, it would stand as an isolated body, unconnected with the general organization and independent of it. Whether during the continuance of this condition, the members of such separating portion might be entitled to any civil rights pertaining to members of the general organization or Church, we need not enquire. However this might be, or whatever might be the case if an entire local society were to assume an attitude of independence and continued in the enjoyment of the local property without a rival claimant; we are satisfied that it would be in direct violation of that principle of the deed which subjects the use of the house of worship to the rules and discipline of the Church, to lend the coercive power of the law for establishing in an independent and unrecognized portion of the local society, a distinct right of occupancy impinging in any degree upon the full and exclusive use of the house by the other, and especially the major portion, claiming the use under its original form and relations, maintaining, so far as its own action was concerned, its connections and dependence as before, and recognized by the proper authorities as a legitimate part of the larger organization.

4. The second clause in the deed points out more explicitly than the first, the position in the general organization of the local society to which the use is intended to be secured, and establishes clearly one criterion of right which is included in the first clause only by reference to the rules of discipline. The second clause relates to the use of the pulpit, and secures it at all times to such ministers and preachers belonging to the Methodist Episcopal Church, as shall be authorized by the General Conference, or by the Annual Conference authorized by said General Conference, to preach and expound the holy word of God therein. It is not necessary to go into any discussion of the official character and duties of the preacher, nor of his connection with the use of the house by the members, nor of his relation to them or to the society of which, in the language of the deed in a subse-

The deed secures the use of the pulpit to such ministers belonging to the M. E. Church as shall be designated by the General Conference, or the Annual Conferences under the authority of the General Conference, and to none other.

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GIBSON *et al.* vs ARMSTRONG, &c.

quent clause, he has the pastoral charge and oversight. It is palpable that the preacher to whose use the pulpit is secured, is to be the preacher of the society to whose use for worship the body of the house is secured, that he is to expound the word of God to the members of that society, and in all respects to perform the duties and exercise the privileges of their preacher and head in the Church.

It would be an absurdity to suppose that the use of the body of the house was intended to be secured to any society, whether its members claimed to be of the Methodist Episcopal Church or not, which would not receive the preacher to whom alone the use of the pulpit was secured. It is just as certain then, in case of division, that the exclusive use is secured to that portion of the society which receives the preacher authorized as mentioned in this clause, as it is that the use is secured to no other preacher but such as is thus authorized. This is the great point of external union with the general organization, which fixes the dependence and subordination of the local societies. It is moreover the especial means of securing the great principle of an itinerant ministry which characterizes this Church, and is regarded as the chief instrument of its success. So far, then, as the deed framed for general use in securing the preaching houses of the Church, is to be viewed as a means of perpetuating its peculiar organization and policy, the principle that the use of the houses is secured to those preachers only who are regularly authorized to preach therein, and to the local societies receiving such preachers, must be regarded as of paramount importance, and as giving proportional weight to the test of right which it furnishes.

In case of division in the local society, the branch of the divided church receiving the minister from the appointing authority, recognized by the society, is to be recognized as the organization entitled to the use of the pulpit under the deed.

5. The appointment by the proper authority, of a preacher for one of the portions of a divided society and its reception of the preacher thus appointed, constitute a mutual recognition, which being found to exist in favor of one portion and not of the other, must, unless in some most extraordinary case, go far to satisfy the mind of the Judge, that the party thus recognizing and recogized by the proper authority, stands legitimately and properly in the place of the entire original society, and is cloathed with its rights. And if the authority thus re-

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If this is controverted, the party denying is bound to make out their right clearly and conclusively.

cognizing and recognized by one of the parties, be the accustomed authority, having by the general laws and usages of the Church jurisdiction over the entire original society, this circumstance will furnish a strong and *prima facie*, a satisfactory proof of right, throwing upon the other party the burthen of showing clearly that the accustomed jurisdiction had ceased to be legitimate, and had been properly displaced by another, which being possessed of the true authority, and recognizing this last party and being recognized by it, had conferred upon it the evidences of right as the representative of the original society. It is not enough for a party contending against the accustomed authority and the accustomed evidences of right, to found its claim upon a doubtful question, whether that organ of the association usually exercising, the jurisdiction in question may not have lost it by some act of its own in violation of the laws of the Church. It is for the authorities of the Church, in the first instance, to judge of an infraction of its laws, and to determine whether the ecclesiastical jurisdiction belonging to any particular body or functionary of the association had been forfeited by such infraction. The civil Judge might greatly apprehend that he would be transcending his proper sphere, if he were to interpose in the first instance to determine such a question, and to enforce his judgment upon it. He would at least lend a reluctant ear to a claim founded on the alledged invalidity, in view of the law of the Church, of an act done in the accustomed manner by the accustomed organ of authority, and sanctioned or acquiesced in by all other recognized organs of the Church. The party setting up a claim on the ground of such alledged illegality, should at least plant itself opon some opposing act or judgment of some recognized organ or body in the Church having authority to act or to judge in the premises. At any rate, if a minority of the local society can, on the ground of a strict right, and of its own determination to resist an alledged infraction of the laws and organization of the Church, claim the intervention of the civil power against the majority having in its favor the accustomed evidences of right, it must bring itself and its claim clearly and

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GIBSON *et al.* *vs* ARMSTRONG, &c.

conclusively within the right as indicated by the terms of the deed, and by the rules and discipline to which it refers. And this it can scarcely do, when it acts not only in opposition to the accustomed local authority, but also in defiance of the highest tribunals of the Church.

6. If there is any truth in the positions which have been advanced, they establish the principal, that in case of a division purely local, in one of the societies for whose use for worship the local property is conveyed and held, the proprietary right is in that party which maintains the true position of subordination and connection, which according to the rules and discipline and authoritative action of the Church, properly belongs to the entire society, and not to that party which claiming in opposition to the authoritative action of the Church, places itself in an unlawful position, and would, in its enjoyment of the use, defeat that provision of the deed which, by subjecting the use to the rules and discipline, subjects it to the legislation which they authorize. Where the local division relates to and is founded on a more general division of the Church, and arises from the adherence of the different local parties to different bodies into which the general Church may have been divided, the question of right between the local parties may involve an inquiry into the circumstances and legality of the larger division, and into the rights of the larger bodies to which the local parties may respectively adhere. But the object of the deed, so long as it maintains the use, is still to maintain it in subordination to the proper authority and to secure it to the society acknowledging that authority and holding in subordination to it. In this more complicated state of case, therefore, as in the more simple one of a purely local division, the question is, what according to the rules and discipline and laws of the Church, is the true position of the local society, and which of the contending parties occupies that position? If it be satisfactorily ascertained that one of the parties alone maintains the lawful position and relations pertaining to the local society to which the use is secured by the deed, the conclusion must be that the entire right is in that party. The two parties avowing adherence to different organizations and

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professing obedience to different jurisdictions, could not both be entitled to the use, unless each of the larger bodies to which they adhered, be entitled to the jurisdiction; and it is difficult to suppose that any circumstance in the deed could withhold the use from that party which alone would hold it under the proper jurisdiction. The preliminary statement of the pleadings and claims of the parties, shows the general bearings of the foregoing views, upon the case before us. It is necessary, however, to their more direct application, and to the more precise developement of the question to be decided, that we should advert to some of the prominent facts out of which the contest has grown. The notoriety of many of them will render a detail unnecessary.

The organization of the M. Episcopal church in the U. S. previously to, and at the date of the deed in this case.

III. It appears that by the constitution of the Methodist Episcopal Church, as existing previously to the late dismemberment, the General Conference consisted of delegates chosen by the several Annual Conferences extending through the United States and Texas; that by the rules and discipline it had power, under a few specific restrictions, to legislate for the entire Church embraced in this extensive organization; that it regulated the boundaries and interior organization of the several Annual Conferences, and that for many years prior to the separation, the Annual Conference of Kentucky embraced the whole State, except the part west of the Tennessee river; that the bodies or meetings called Annual Conferences, by which alone the delegates to the General Conference are chosen, consist of the ministers and travelling preachers within the boundaries of the respective Conferences, from whom are supplied, under the authority of the General Conference, and by express provision of the rules and discipline, the preachers for the several stations, societies, &c., within the bounds of the Conference. The Maysville station or society being embraced within the Kentucky Conference, rightfully and habitually received its preacher from that Conference prior to the division.

The resolutions of the General Conference of 1844, upon the subject of the division of the

But the General Conference of 1844, having adopted measures which, by many southern delegates, were deemed injurious to the rights, and character, and usefulness of the southern ministry of the Methodist Episcopal

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GIBSON *et al.* *vs* ARMSTRONG, &c.

Church, and authorizing the Southern organization.

Church, a declaration signed by the southern delegates, and stating their apprehension of the necessity of a separation, was presented to the General Conference, which thereupon passed a set of resolutions providing for the manner and consequences of the anticipated separation, should it be found necessary, and authorizing, in that event, a distinct southern organization.

The action of the Southern Conferences in joint assembly in '45, under the resolutions of the General Conference of 1844, renouncing connection with the pre existing organization, and organizing under the name of the "M. E. Church South," but retaining the same *faith, doctrine, rules and discipline*—ratified by the Kentucky & other Annual Conferences.

Under the sanction of these resolutions, a convention of delegates from fifteen southern Conferences, assembled in 1845, renounced, by solemn act, their connection with the pre-existing organization and the jurisdiction of the General Conference as then constituted, and retaining the same faith and doctrine, the same rules and discipline and the same form of constitution and government, established for themselves a new and independent organization, under the name of "the Methodist Episcopal Church South," and a new General Conference for that Church. The Kentucky Annual Conference, with the others represented in the Convention, ratified this act, and thus became connected with the southern organization, and a component part of the Methodist Episcopal Church South.

The Maysville local church divide, one receiving a preacher from the Northern and the other from the Southern organization, each claim the exclusive use of the church property in contest.

One portion of the Maysville society adhering to the Methodist Episcopal Church South, and acknowledging its jurisdiction, receives its preacher as usual, from the Kentucky Conference, the other portion rejecting the new organization, professes adherence to so much as remains of the old one, under the name of "the Methodist Episcopal Church," and receives its preacher, as is understood, from the neighboring Conference of Ohio. We have seen, however, that the members of this society or party claim that they being still members of the Methodist Episcopal Church, and the others being members of a different Church, they alone, as coming within the description of beneficiaries in the deed, and acknowledging the jurisdiction of the General Conference therein referred to, are entitled to the exclusive use of the property.

IV. In considering this claim, which merging the question as to the lawfulness of the southern organization, the division of jurisdiction between the two general Churches, and the true position of the Maysville Church or society,

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as pertaining to one or the other jurisdiction, rests solely upon a strict literal application of the terms of the deed to the members of the Methodist Episcopal Church, and the General Conference of that Church, we shall not stop to determine whether the party setting up this claim, has shown such a subsisting connection, (since the division,) between itself and that organization, which it claims to be the only true Methodist Episcopal Church in the United States, as would, under the interpretation contended for, entitle its members to any right of property on the ground of their being members of the Methodist Episcopal Church. But assuming for the present, that there is such connection, and on the other hand, that the separation of the southern Conferences, and the independant organization of the Methodist Episcopal Church South, took place under the authoritative sanction of the original Methodist Episcopal Church, and that the Maysville society was lawfully placed under the jurisdiction of the southern Church, we inquire whether, by force of the terms of the deed used in describing the beneficiaries and the use of the property, that portion of the Maysville society which maintains the lawful position of that society, is to be excluded, to any extent, from the use, in favor of that portion which, in violation of the terms of separation, would place it in an unlawful position? A summary answer to this question may be suggested by the supposition that instead of the Maysville society being divided upon the question of jurisdiction, it had adhered, unanimously, to the Kentucky Conference, and gone with it into the southern organization. Would the entire society have lost by this authorized movement, its right to the use of the local property? Could it have been afterwards disturbed in its use by any action of the remaining Methodist Episcopal Church or its General Conference, either by a preacher sent in opposition to the authority of the southern Church, or by a new society reared up in the city of Maysville, under the care of the other Church? If, as we suppose must be admitted, it could not, how can the right of the major portion of the society occupying the lawful position of the whole, be denied, or how

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Gibson et al. vs Armstrong, &c.

can it be affected by the claim of the minority, not occupying the lawful position of the whole society?

But we do not rest the negation of a claim so strenuously urged as this has been, both by the party and the counsel, upon the force of these interrogatories. In the first place, we do not admit that the phrases, "the members of the Methodist Episcopal Church" and "the ministers and preachers," and "General Conference of said Church," used in the deed as descriptive of the beneficiaries, and of the power or organ of the Church by which the use may be regulated, can operate to make the continuance of the name and unity and organization of the Church in the precise state in which they are referred to in the deed, or existing at its date, a condition on which the continuance of the use or right of occupancy is to depend. This deed, and the others like it, were not executed by a donor, prescribing as the condition of his charity, that it should be administered through all time, in a designated mode, and through a special instrumentality created by himself. They do not create the institution which is to receive the charity, nor profess to regulate its constitution. The donations were made by the persons who were themselves to enjoy the use as members of an existing association, and it cannot be inferred from a mere reference in the deed to the existing name and organization of the body, and to the functions of its parts as then exercised, that it was intended to preclude absolutely, such changes by the proper authority, in any or all of these particulars, as necessity or convenience, or a sense of propriety might dictate, or that it was intended that the rights of the actual donors or their successors, assured by the deed, should be forfeited by yielding to such change.

The Methodist Episcopal Church has the same power of changing its name, form and organization as it had at its first organization—it is inherent. The deed in this case does not confine the use to the

The Methodist Episcopal Church as an organized body, instituted and maintained by the voluntary association of individuals, existed and still exists, independently of the deeds, and with the same power of changing its name and form and organization, as it had at first of fixing them. This power, inherent and inextinguishable in the Church, the deed, by whomsoever made, and although the grantor might be a donor, could not annihilate; and without ex-

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press words to that effect, it cannot be presumed that they intended to control or limit its exercise. They could not, and do not profess to give perpetuity to the institutions to which they refer, and they should not be understood as making their immutability a condition of the enjoyment which they profess to secure. It is to be observed too, that it is not the deed but the constitution of the Church, the terms of association, the rules and discipline that subject the local societies to the authority and legislation of the Church. The deeds, in placing according to their appropriate operation, the use of the local property under the same subjection, intend not to impair but to secure the relations of authority and subordination which the rules and discipline establish. And it would involve an obvious inconsistency to say, that by obedience to the authoritative legislation of the Church, no matter what changes it might involve, a local society would forfeit its right to the use which by the deed creating it, is subjected to the same legislation. Such a consequence from such a cause, would be the more unjust, inasmuch as by the general laws of the Church, the local societies have no voice in the legislation which they are bound to obey. It seems more consonant with reason and with the general objects of the deeds, to say that in subjecting the use to the same authority to which the beneficiaries are subjected, they intend to make disobedience rather than obedience to the lawful acts of the Church, a ground for forfeiture, and that although the use is conveyed to the local societies, as parts or sections of one general body by name, yet so long as they remain blameless, their right to the use cannot be affected by any change in the name, condition or organization of the general Church, whether caused by its own will or by a necessity beyond its control. And we embrace the conclusion that whatever change, by its own legislation or by inevitable calamity, might befall the Church, though its entire connecting organization should be dissolved, the Episcopate be lost, the General Conference become extinct, and nothing remain but the Annual Conferences with their interior organization, or nothing but the local societies themselves, and though in this state of things there

society under any particular name; and the right of the local society under the deed, would not, though the General Conference should cease to meet, become extinct.

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GIBSON *et al.* vs ARMSTRONG, &c.

would, in strictness, be no Methodist Episcopal Church, the use would still remain secured to these societies, under the firm tenure of these deeds.

The great object of the deed in the case, was to secure the use to the local Church, though in subordination to the higher authorities of the church as then existing. It does not now exist as it then did, but the local society, the beneficiaries, are there, and the deed should not fail to secure the benefits extended to the local society.

The first object of the deed, we repeat, was to secure the local use to the local societies. They intended to secure it in subordination to the higher authorities of the Church, whereby the regular connection and relation of the parts to the whole would be secured. And they looked to the existing organization by which the great mass of the Methodist Episcopalians in the United States were constituted one body, as the whole, of which these societies were parts, and to whose laws their use of the local property was to be subject. But this union and organization, powerful and complete as they were, though connected by long cherished sentiments of affection, by the sense of power and by the pride of success, and though sustained by institutions apparently calculated to secure, not only the indefinite extension, but the continued integrity of the body, were still subject to the law of change, and to all the vicissitudes that belong to the creations of men. They were subject to change, not only from the force of external circumstances, over which the body itself might have no control, but more certainly perhaps, from the various and varying will or opinions or interests of its component parts, and at last, inevitably from its own extension, involving unwieldy magnitude, and the union of incoherent elements. The deed, though it may have intended to avert, has been powerless to prevent, and does not profess to prohibit a change of organization by which the union existing when it was executed, and when its provisions were framed, has been dissolved. That union has in fact been broken up by a division of the Church into two distinct parts. And we are called on to apply to the consequences of a catastrophy which, if it had not occurred when and as it did, must at some time have happened, the provisions of a deed which having been made when the Church was united and division not contemplated, refers, as might be expected, to the existing name and organs and action of a united Church. The one united Methodist Episcopal Church referred to in the deed, and extending its name and au-

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thority to the utmost limits of the United States, having ceased to exist by division into two Churches, of distinct territorial jurisdiction, there is in fact no such Church as is contemplated in the deed, and therefore no General Conference of such a Church, no ministers and preachers of such a Church, no members of such a Church. Must the uses of the deed then fail by a technical interpretation of its terms, because the objects referred to no longer exist in the same forms and under the same name as when it was framed and executed? Or should we not look to the substance rather than to the names and forms of things? And if in consequence of changes, which if not inevitable, cannot be repaired, every object of the deed cannot be precisely attained, should it not, so far as possible, be made effectual to secure its substantial and primary objects, by a liberal application of its terms to the actual state of things? As the Methodist Episcopal Church in its name and unity as well as in its particular organization was subject to change, as the makers of the deed by which property is conveyed to the use of a particular section of the Church, had no right to control its power of self-regulation, and have not professed nor attempted to do so, and as it would be subversive of the primary objects of the deed, to make its efficacy to uphold the uses which it declares, dependent on the continued identity of the name and functions and organization to which it refers in describing those uses, it seems to be not only reasonable but necessary, that it should receive such a construction as will make it at all times applicable to the condition in which the Church may be placed, either by its own legislation or by a recognized necessity, the force of which legitimates its consequences; that its reference to certain powers and functions as belonging to particular organs existing at its date, should be understood as applying to the same functions by whatever organs they might afterwards be legitimately exercised; and that in subjecting the use to the action of the existing organs of legislation and appointment, it should be understood as intending to subject them to the legitimate successors of those organs. So that in maintaining this subjection, its objects, so far as in refer-

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GIBSON et al. vs ARMSTRONG, &c.

ring to the exterior relations of the local society, it intends to fix its position as part of a larger system, and to secure its subordination to a higher authority, are fully accomplished.

The right of the M. E. Church to change materially its form of organization was recognized by the act of the church in changing the character of the component parts of the General Conference in 1808.

If the unity of the Church had remained unbroken by the late revolution, there could, as we think, be no serious question as to the correctness of a construction which would make the deed applicable to any changes which the Church might authorize, with the effect of securing the property to the local society preserving its proper relations in obedience to such change, to the exclusion of any organized portion of it, which opposing the change, might refuse obedience to the authority of the Church, and throw off the appropriate relations of the society. In fact, before the execution of this deed, but after its language had been framed and recommended for general use, a most important change had already occurred in the composition and authority of the General Conference. That body, consisting originally, as might be implied from the reference to it in the deed, of all the ministers and preachers of the Methodist Episcopal Church in the United States, in whom collectively subsisted without restriction, the power of legislation and government in the Church, was transformed in the year 1808, by its own action, into an assembly of delegates to be chosen by the ministers and preachers in their several Annual Conferences, and to be possessed of restricted powers. This change was not even followed by an alteration in the terms of the deed referring to the General Conference, and certainly had no effect upon its operation in securing either the local property to the local societies, or the subordination of its use to the legislation of the General Conference as newly organized. Nor can it be doubted, that in case of division and contest in one of the societies, based upon a difference of opinion as to the propriety of this change, or of submission to it, the deed whether executed before or after the change, would have decided peremptorily against the party, which in an organized form, had renounced the authority of the new General Conference, and was renounced by it. And so if after the execution of the deed before us, there had

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been a further authoritative change in the composition of the General Conference by the introduction of lay delegates, or if its name had been changed to that of "the General Assembly of the Methodist Episcopal Church," and so if the power of appointing the preachers to their several stations, had been vested exclusively in the Bishops, or if the office of Bishop had been wholly abolished, and a corresponding change had been made in the name of the Church, whereby it had become "the Methodist, or the Reformed Methodist Church," instead of "the Methodist Episcopal Church."

What effect then, in this last case, would be given in the civil tribunal to the appeal of an organized part of one of the local societies, which separating from its own society, renouncing the authority of the Annual Conference to which it belonged, and rejecting the jurisdiction of the existing General Conference and of "the Reformed Methodist Church," should claim the exclusive, or any interest in the local property, on the ground that "the Reformed Methodist Church" was not "the Methodist Episcopal Church;" that a majority of the society and the Annual and General Conferences with which it was connected, having become or adhered to "the Reformed Methodist Church," were no longer parts or members of "the Methodist Episcopal Church," but that the members of the minority alone, rejecting the new name and the new Church, and continuing to be as they had always been, members of the Methodist Episcopal Church, were alone the true beneficiaries of the deed, and as such entitled to the exclusive use of the property conveyed by it? Most assuredly it would be a sufficient and proper answer to such an appeal, to say that the name, and form and organization of the Church, and the arrangement and functions of its different parts and tribunals, were all subject to be changed according to the will and judgment of the Church, uncontrolled either by the deed or the law of the land; that the Methodist Episcopal Church having by its own act, become the Reformed Methodist Church, this latter Church, whether differing in substance or in name only from the former, occupied its place and authority in the system, and must, in ascertaining the ope-

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GIBSON *et al.* vs ARMSTRONG, &c.

ration of the deed, be regarded as the Church therein referred to; that the deed must, therefore, be understood as securing the use to the members and preachers of this substituted Church, and in subordination to its authority; that the members of the Methodist Episcopal Church became, by the authoritative change of its name and organization, members of the new Church, or continued to be members of the old one by its new name, unless they rejected this membership; that the deed applied and secured the use to them in this character; and that the minority, in rejecting their accustomed relations and position in the system, had abandoned the rights of property pertaining to them as a part of the system.

The right of the M. E. Church by its own act to divide, recognized as an inherent right, and the right to fix the territorial lines, also recognized without changing the rights of the beneficiaries in the deed in this case, and the deed must be presumed to have been made in view of these rights.

And if, instead of the change just supposed, the Methodist Episcopal Church had, by its own authoritative act, divided itself into two distinct and independent bodies, each perfect in itself, on the plan of the original organization, and assigning to each on its own side of a common boundary, the entire jurisdiction which it had itself possessed within the same limits, had denominated one "the Methodist Episcopal Church North," and the other "the Methodist Episcopal Church South," these two Churches differing from the original and from each other, only in locality and extent, and in the discriminating adjunct to the common name, would each undoubtedly possess within its territorial limits, the entire jurisdiction and authority of the original united Church, and would within those limits, fully represent it, and to all purposes occupy its place. The members of the pre-existing Church would of course, unless they chose to renounce their membership, be members of the Church North or South, according to the locality of themselves or of the societies to which they belonged. Each of these Churches would bear the same relation to the different parts of the system within its jurisdiction, as the original Church had done to similar parts of the original system. And with respect to the construction and application of these deeds, each would be as to the property within its limits "the Methodist Episcopal Church," for the use of whose members and in subordination to whose laws, the property was conveyed and held; and the deeds would receive the same

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construction and application as if the word "North" or "South" had been added to the name of the Church in the deeds themselves.

The right of the Church to divide is recognized, & the right of the members adhering to the branch of the Church within the jurisdiction in which the local Church exists, conforming to the rules and discipline thereof, is recognized under the deed in this case.

Such acts as have been supposed, if done by a competent power in the Church, must, until annulled by a similar authority, be binding upon whatever is subject to the legislation of the Church, whether it be the uses of the local property, the relations of the local societies or other organic parts of the system, or the rights of individual members as such. And we maintain and think it has been clearly shown, that as the deed does not and cannot control these acts, it must be understood as intending to follow them, and by adapting itself to every vicissitude to which the Church may be subject, to attain its great object of securing the use of the local property to the local societies in subordination to the legitimate powers that be.

We come then to the case actually existing, in which, according to the assumptions under which we are now considering the subject, the Church, instead of dividing itself into "the Methodist Episcopal Church North," and "the Methodist Episcopal Church South," leaving no residuum under the name simply of "the Methodist Episcopal Church," has sanctioned the independent organization of the Southern Conferences, and under that sanction, the Maysville society or congregation has been placed under the jurisdiction of the Methodist Episcopal Church South. But is there any difference, so far as the rights and jurisdiction of the Southern Church are concerned, between the case as it actually occurred and the supposed case of a division of the original Church into the Methodist Episcopal Church North, and the Methodist Episcopal Church South? Does the fact that there still remains a portion, whether small or large, of the original body under the original name of the whole, invalidate the separation or the rights of the separating portion? Could the remaining portion of the original body, re-assert in the name of the whole, the jurisdiction which had been renounced by the whole, or revoke the assent which the whole body had once given to the independence of the separating portion? Certainly if the

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GIBSON *et al*, vs ARMSTRONG, &c.

whole body had power by its assent and co-operation, to legalize the separation and independence of a part of itself, the remaining portion of the original body, though retaining the original name of the whole, would have no power, after such assent had been given and acted on, to undo by its own mere will, what the entire body had authorized. Whatever else may be implied from the identity of name, it cannot give to the present Methodist Episcopal Church a jurisdiction which the original Church had alienated.

But it seems to us too evident to require illustration, that the rights and jurisdiction of the Southern Church, and the rights of its members are precisely the same within its own organization, as if the present Methodist Episcopal Church were called the Methodist Episcopal Church North; that if the southern organization has the sanction of the original Church, it can suffer no disparagement from having been the separating portion, but its independence and jurisdiction are complete; and that to the extent of its jurisdiction it stands in the place of the Methodist Episcopal Church, and is to be so regarded, as well in giving construction and application to these deeds, as in determining the rights and duties of its members. It follows, upon the principles already established, that if the Maysville society or congregation has been properly placed under the jurisdiction of the Church South, the use of the property conveyed by the deed before us, is also within that jurisdiction, and belongs to the party adhering to that Church, which, so far as this deed and the Maysville society are concerned, is "the Methodist Episcopal Church," for the use of whose local members the property is conveyed and held.

Did the separation take place in the mode recommended, and is it valid?

V. But every part of the assumption which establishes the legality of the separation and of the position of the Maysville society as a part of the southern organization, is denied by the complainants, and it is necessary to investigate the assumed basis upon which the foregoing conclusion rests. This investigation involves an inquiry first into the power of the Church to authorize its own dismemberment, and of the General Conference to act for the Church in this respect, and then into the terms of

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separation as prescribed by the resolutions of the General Conference, and into the proceedings which have taken place under them, so far as to determine whether the independent organization of the Methodist Episcopal Church South, has in fact the sanction of the General Conference and of the original Church, and whether the Maysville society or Church is, under the same sanction, a part of the Southern Church.

A Church organization being a self created body may separate or divide by its own act, as States & Empires may divide, and as did Kentucky and Virginia, by consent of the authorities, &c.

That a Church organization, a self created body, subject so far as its own constitution and organization are concerned, to no superior will, cannot by its own assent authorize and legalize its own dismemberment, is a proposition contradicted by reason and analogy. That such a measure is inconsistent with the motives and ends of its institution, is no more true with regard to such a body, than with regard to other associations, private or national. Even in the case of States and Empires, the unauthorized separation of a part, though originally illegal, and subjecting the separatists to reclamation and punishment by the remaining government, is legalized by its subsequent assent, with the effect of establishing in the separating portion, all the rights of independence and self government. It is this assent alone which puts a final end to the right of reclamation on the part of the nation or government from which a portion has separated. And much more must the previous consent of the whole nation or its government to the future independence of a part, have the effect of legalizing a separation taking place in virtue of such assent, and of terminating absolutely, all right of reclamation. If in the history of nations we find few instances in which this assent is yielded except at the end of a struggle, often bloody and protracted, for independence on the one side, and on the other for re-subjugation, there are still some examples of a government which, becoming sensible of the necessities of a connected and dependent portion, or perceiving the incongruities of the connection, has laid down beforehand, the terms of separation and independence, which on being accepted and acted on by the portion to which they were addressed, have become a solemn compact, binding as such, both upon the old and the new State. Among

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GIBSON et al. vs ARMSTRONG, &c.

these examples the separation of Kentucky from Virginia, of which it formed an integral part, is a precise instance of this kind; an instance too, in which although the government of Virginia was representative in character, possessed of delegated powers only, and not expressly vested with the power of dismembering the State; yet the act and assent of that government was deemed sufficient to authorize the proposed action on the part of the people of Kentucky, who desired separation, and to bind the remaining people of Virginia without further evidence of their will. And yet it was true of the government of Virginia, as of all others, that it was instituted to preserve, and not to destroy the State, or to impair its power.

The duty of caring for and promoting the welfare of every part of the body, the duty of self preservation itself, and the corresponding rights essential under various circumstances, to the performance of these duties, indicate the power of authorizing or assenting to a dismemberment, as one necessarily inherent in every association, to be exercised indeed according to the prescriptions of its fundamental law, if there be any on that subject, but unless there be some special provision or prohibition other than that which is implied from the duty of preserving the integrity of the body, to be exercised as convenience and experience prove by the active governing powers of the association. It does not admit of question that such a power belonged to the Methodist Episcopal Church, and that *prima facie* the General Conference the supreme active organ of its government, clothed with powers of legislation almost unlimited, and having alone in case of unlawful secession, the right of recognition or reclamation, might effectually exercise the power in advance. Indeed, the history of the Church shows that many years since, the General Conference, without reference to its constituents, assented to the separation and independence of the Canada Conference, then forming an integral portion of the general organization, and having, or entitled to have its delegates in the General Conference itself. And although there seems to have been some doubt on the question of power, we do not perceive that the grounds of that doubt bring in question the power of

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the General Conference, any more than that of the Church at large, which is unquestionable. The measure, however, was adopted, and no doubt has been since entertained, of the lawful independence of the Canada Conference.

The M. E. Church acted upon the same principle in separating Canada, after first fixing a dividing line between the two bodies of Methodists in Canada; of the propriety of the division the several Conferences had the right to judge.

An earlier instance of the exercise of power on this subject by the delegated General Conference, must not be omitted. Societies of Methodists having been organized in the Canadas by preachers of the Methodist Episcopal Church in the United States, and preachers having been also sent into the same regions by the British Methodists, under whose ministrations local societies were also established in the same towns or neighborhoods, the consequence was, that instead of harmonious efforts in extending their common faith and doctrines, there was sometimes exhibited between the parties acting under these different authorities, an unseemly rivalry, degenerating into a mere struggle on each side to strengthen itself at the expense of its competitor. To put an end to a state of things so derogatory to the character of each of the principal parties, and felt by both to be at once injurious to the religion which they professed, and inconsistent with the relations which a community of origin and of faith and doctrine required, a negotiation was set on foot between the General Conference on the one side, and the British Methodists on the other, the result of which was an agreement fixing the boundary line between the two Canadas as the line which should separate their respective jurisdictions. In pursuance of this agreement, the British Methodists surrendered their societies in Upper Canada to the Methodist Episcopal Church in the United States; and the General Conference, without (so far as we have learned) consulting the societies which had been reared under its care in Lower Canada, or their preachers, or the Annual Conferences in the United States with which they had been connected, withdrew their preachers, surrendered the societies to the British Methodists, and dissolved all of their subsisting relations with the Methodist Episcopal Church in the U. S. An Annual Conference having been afterwards established in Upper Canada, in connection with the Methodist Episcopal

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GIBSON *et al.* vs ARMSTRONG, &c.

Church in the United States, the General Conference, at its request, dissolved the connection, and as already stated, authorized it to assume independence. If the fact that the Conference of Upper Canada and the societies in Lower Canada were under a foreign political jurisdiction furnished a strong motive for the acts which have been stated, they also furnished a strong proof of the necessity and existence somewhere in the Church, of a power competent to the performance of such acts. But the acts referred to, involving as they do, the power not only of authorizing, but also of coercing dismemberment, would, as precedents, more than cover the power and act now in question. And the performance of those acts by the General Conference upon its own judgment as to the exigency of the case, implies the assertion by that body of its right to exercise a similar power, when in its own judgment it might be necessary and proper. If owing to the peculiar circumstances then existing, these cases are not entitled to the full weight of precedents, establishing the existence of the power in the General Conference, they at least tend strongly to corroborate the position, that that body is the appropriate and recognized organ of its exercise. We should not indeed, expect to find an express delegation of this power, and especially in an association having for one of its great objects its own extension. But as already shown, the power necessarily exists, to be exercised when occasion may require it. The experience even of this association shows that occasions may arise when a diminution of its extent is proper and necessary, and that the General Conference, according to the indications of convenience and analogy, has been allowed both to judge of the necessity, and to adopt the measures which it required. Whatever dangers may be involved in such a power, however momentous the consequences of its exercise may occasionally be, still when we consider the motives which concur in urging the General Conference to maintain the integrity of the body which it governs, and the extreme improbability that it would consent to a diminution of the body, and of its own power and authority, except upon the most urgent occasion, there would seem to be little ground

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for apprehending an abuse of the power in its hands. Then the consideration, that as the representative and governing power of the whole association connected with all its parts; overlooking all, sympathizing with all, it is better able than any or all of the local bodies which it represents, to take a just and comprehensive view of the interests and necessities of the whole, and of every part, demonstrates it to be the proper depository of the power of determining when, in view of the general good, the separation of a part may be necessary or allowable. The fact that it is only through the General Conference that the local bodies composing the system can regularly act upon each other, corroborates the same conclusion. And unless it be assumed that the necessity for separation can never be sufficiently demonstrated until it actually takes place and has become irremediable, that it can, therefore, never be legalized *a priori*, that it must always be violent and unlawful, and can never be peaceful and conventional; we think it must be conceded that in the absence of express provision to the contrary, the General Conference has the right, on its own judgment of the necessity of the case, to assent to, and thus to legalize the separation of a part of the Church. Assuming that in the eye of the Church and of its constitution and laws, peace is deemed better than strife, harmony more desirable than discord, and certainty in the rights and duties of its members preferable to confusion, and regarding it as certain, that in case of illegal separation the General Conference might, by its subsequent action clothe it with all the sanction which the Church could give to it, we do not doubt that the same body, unless specially restricted in that particular, may and should, upon its own judgment of the necessity or justice of an anticipated separation, give to it at once the sanction of the Church and of its law, and by regulating its terms and its limits, make it as fruitful of good and as little harmful as the nature of the case will allow.

The General Conference of 1844, had the right to judge of the necessity or expediency of divi-

VI. In this view of its rights and duties, the General Conference of 1844, seems to have acted in adopting the resolutions under which the Southern Conferences have assumed an independent organization. The declaration

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GIBSON *et al.* vs ARMSTRONG, &c. ding the Methodist E. Church, and permitting the M. E. Church South to form a separate organization, and to adopt the plan.

of the southern delegates above mentioned, having been referred to a large committee, a preamble declaring it to be "the duty of the General Conference to meet the emergency indicated by the declaration, with christian kindness and the strictest equity," and resolutions framed in the spirit of peace and justice, were reported by the committee and adopted by the Conference by a vote approaching unanimity. The first resolution, which distinctly lays down the plan of the separation, and the condition on which it was to take effect, is in the following words:

The resolutions of the General Conference on the subject of a Southern organization.

"1. Resolved, that should the delegates from the Conferences in the slave holding States find it necessary to unite in a distinct ecclesiastical connection, the following rule shall be observed with regard to the northern boundary of such connection: all the societies, stations and Conferences adhering to the Church in the south by a vote of a majority of the members of such societies, stations and Conferences, shall remain under the unmolested pastoral charge of the Southern Church, and the ministers of the Methodist Episcopal Church shall in no wise attempt to organize Churches or societies within the limits of the Church South, nor shall they attempt to exercise any pastoral charge therein, it being understood that the ministry of the south reciprocally observe the same rule in relation to the stations, societies and Conferences adhering, by vote of a majority, to the Methodist Episcopal Church; provided that this rule shall apply only to societies, stations and Conferences on the line of division and not to interior charges, which shall, in all cases, be left to the care of the Church within whose territory they are situated."

The second resolution authorizes ministers of every grade in the Methodist Episcopal Church, to attach themselves, without blame, to the Church South. The six following resolutions relate principally to the book concern and the chartered fund, after first recommending to the Annual Conferences a modification of the constitutional restriction applicable to this particular subject, go on to provide, conditionally, for the equitable distribution of these properties between the two Churches. The

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ninth resolution declares that all the property of the Methodist Episcopal Church, in Meeting Houses, parsonages, &c. &c., within the limits of the southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal Church, as far as this resolution can be of force in the premises. And the tenth allows to the Church so formed in the south, a common property in all copy rights, &c. &c.

The spirit of equity which pervades these resolutions, the care and caution with which they were evidently framed, the respect which they pay to constitutional restriction when it was supposed to apply, the deliberation with which they were considered and passed, the interesting circumstances which led to their introduction and the importance of the interests which they profess to regulate, all concur in giving to their adoption, as an assertion of power by the highest functionary of the Church, a weight of authority not easily overcome. To this is to be added the concurrence of the Bishops of the entire Church, who evinced their opinion of the validity of the resolutions by publicly recommending a proper method of taking and certifying the vote of the border societies, which they authorize. Then the precedents and more general considerations before odverted to, tend to establish in the General Conference the power involved in the passage of these resolutions. And the Southern Conferences having, in virtue of these resolutions, erected an extensive ecclesiastical organization, whose rights and jurisdiction are based upon their authority, we are by no means sure that a Court of Justice, a power outside of the Church, has a right to disturb the state of things sanctioned by such evidences of its legality, and by the acts and opinions of the highest tribunals of the Church, upon the ground of its own mere opinion that one of these tribunals has violated, not the law of the land, but the law or constitution of the Church. There would seem to be due from the tribunals of the civil government to those of the Church, at least so much respect as to require that the acts done by the latter, in the name of the Church, should be deemed valid under its law, and that the dependent right should be determined accordingly, until those acts

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GIBSON et al. vs ARMSTRONG, &c.

were reversed by the Church, or at least until they were conclusively demonstrated to be against its law. The evidences in favor of the validity of the act of the General Conference now in question, are so strong as almost to preclude the possibility of a conclusive demonstration against it, and certainly too strong to be overthrown by any doubtful construction.

Where the acts of the highest Church judicatory should even be of doubtful authority, and yet where the Church ratifies the act, the judiciary will be slow to interfere where discord instead of peace would be the consequence.

If the question of power were doubtful, we should be bound to regard the act of the General Conference as the act of the Church, and therefore as effectual. And if we even entertained the opinion that the late General Conference exceeded its power in attempting to authorize, in advance, the anticipated separation, still the Church might by its subsequent sanction, ratify the act and give full validity to its consequences; and as the question with the Church would be one not only of ecclesiastical law, but of ecclesiastical policy; and the same considerations which operated on the General Conference, might also bring the Church to the conclusion that its great objects would be better accomplished by two independent organizations, with jurisdiction territorially divided, than by attempting to maintain a nominal union of discordant elements, or by spreading over the same territory two Churches struggling for power in every congregation; it would be a serious question whether a Court, whose decision could not restore harmony and union to the Church, but might introduce local strife and discord and confusion, should not rather respect the existing state of things until the Church itself should act, or assume inaction, to be itself a sanction, than undertake to decide for the Church, whether it should be united or divided.

But as under every view of the question of power which has been presented to our minds, we have no serious doubt upon it, and as it may be of importance to the parties concerned, that the opinion of this Court and the grounds of it, should be expressed upon every point involved, we proceed to notice briefly, the constitutional restrictions supposed to bear upon it. The General Conference, in addition to other powers of a mixed character, is expressly vested with power to make rules and regulations for the Church, subject only to six restrictive clau-

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ses contained in the rules and discipline. Of these, two only are urged as having application to the present subject.

The first of these clauses prohibits the General Conference from changing "any rule of our government, so as to do away Episcopacy, or destroy the plan of our itinerant general superintendency;" that is, the plan by which the Bishops of the Church are to travel through the entire connection, and to visit and act in all the Annual Conferences. But if it necessarily follows from the separate organization of a part of the Church, that the rights and duties of the Bishops are limited to the respective organizations to which they belong, this does not destroy the plan of itinerant superintendency, but leaves it in full force to the extent of each of the connections or organizations. The plan or principle referred to, may exist in full force, notwithstanding the reduced extent of the connection. Indeed, so far as its strict observance and salutary operation are concerned, these objects would seem to be hazarded rather by an extension than by a curtailment of the connection which would form the field of labor and of travel. And of this the history of the Church and of the General Conference bear testimony. But be this as it may, the plan was adopted when the connection was much less extensive than in 1844, and it may, and as we presume, does still exist in full activity and vigor in each of the two organizations of the Church. This clause, therefore, cannot operate either directly or by any admissible construction as a negation of the power to divide the Church, or to authorize the separation of a part.

The first restriction relied upon in opposition to the power of the General Conference to divide the Church 'that they shall not do away Episcopacy or destroy the plan of our itinerant general superintendency.' Held not to be any restriction upon the power exercised.

The other restrictive clause relied on, declares that the General Conference shall not "do away the privileges of our ministers and preachers, of trial by a committee, and of an appeal, nor shall they do away the privileges of our members, of a trial before the society, or by a committee and of an appeal." According to the rules and discipline as existing before and since the separation, the appeal of ministers or preachers is to the General Conference, but in the case of a member, it is to the Quarterly Conference, or at most, to the Annual Conference. The ministers having a right, by the plan of sepa-

The second, 'Nor do away the privilege of our ministers and preachers of trial by a committee and of an appeal; nor shall they do away the privilege of our members of a trial before the society, or by a committee, & of an appeal.' Held that this rule has no bearing upon the question of

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GIBSON *et al.* vs ARMSTRONG, &c.

power to divide the Church.

ration, to take their place in either of the two connections, and thus to choose their own appellate tribunal, there is no color for charging an invasion of their privileges as secured by this clause. And as the appeal of a member does not reach the General Conference, it is not affected by the introduction of two tribunals of that name, with divided jurisdiction, in the place of one whose jurisdiction comprehended the whole Church. This clause, however, does not regulate the mode of trial, nor fix the tribunal of appeal. But securing the right of trial by the society or by a committee, and the right of appeal, it leaves the trial and appeal to be regulated in other respects by the General Conference. It relates exclusively to the trial of individuals, ministers and members, which might result in expulsion or other punishment, personal to themselves, and does not touch the power of the General Conference, as the legislative organ of the Church, to prescribe and alter its local arrangements, to regulate its organization, to withdraw its jurisdiction from a separating portion, or to assent to and authorize such separation, when in the judgment of that body it is deemed necessary or just. No acts of the General Conference seem to be more unquestionably within its power than those by which it has from time to time, and often fixed and changed at its own discretion, the boundaries of various Annual Conferences, with the effect of changing the position and proximate relations of particular local societies and their preachers. These unquestioned acts of legislation, show that this clause did not intend to secure to individuals the continuance of the same appellate tribunal, but only the right to a trial by the prescribed tribunal, and then to an appeal to one of higher jurisdiction.

VII. The resolutions constituting the plan of separation, do not expel any individual from the society of which he was a member, nor deprive him of any privilege of property or worship pertaining to that society. But as they propose and provide for a complete separation according to the organic or territorial divisions of the Church, they necessarily involve a partition of the governing power between two jurisdictions, each possessing within its

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territorial limits, the same authority and power as had previously belonged to the whole Church. A further necessary result is, that in some cases particular societies are placed under one or the other of these jurisdictions, against or without the consent of some of their members, who would have prefered a different position, or disapproved wholly of the separation.

The Conference had the right to concede to the Church to determine by a majority, the branch of the divided Church to which the local Church at Maysville would adhere; (it might have determined that question without referring it;) the will of the majority then determines the jurisdiction to which the local Church was subject. In this there was no violation of principle.

The complainant and his associates being in this condition, deny the power of the General Conference thus to transfer them from one Church to another, without or against their consent. But as the measure takes effect by the concurrent action of the General Conference and of the Annual Conferences to which the terms of separation were addressed, the real question is, whether this concurrent action was competent to determine the question of separation, and to define its limits without more particular reference to the will or opinion of the individual members. If it was, then the reference to the vote of the border societies for determining the position of those societies, is a concession, which, operating of course according to its own terms, gave the power of determination to the majority, to which also it would have certainly belonged, if the vote were taken in the exercise of an unrestricted right in the members to determine the position of their society.

The complainants indeed seem not to rely upon the popular principle, which would refer a question affecting numerous individuals, to the decision of the majority, but rather upon some supposed indefeasible right of the individual members to, or in the unity and identity of the Church, and its jurisdiction or protection, which rising above all the powers of the Church, would enable a minority, however small, or perhaps a single individual, to obstruct or defeat, in a question of dismemberment, the will and action of the entire residue of the Church. But we perceive no foundation for the assertion of such a right, in any provision or restriction of the Constitution, and the rights of individuals as founded in or measured by the duty of protection on the part of the entire association, or its governing power must yield, as we have seen, to those occasions which justify or require dismem-

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GIBSON *et al.* *vs* ARMSTRONG, &c.

bement, and which are to be authoritatively judged of, not by a minority nor by each individual member, but either by the majority of individual members or by that power which is authorized to act for the whole. To say that the Church could not be legally or rightfully divided according to its organic or territorial parts, without the unanimous consent of all the members of the entire Church, or even of all the members of the part proposed to be separated, would be to deny the power of division by any mode of action, since it would subject it to an impossible condition. And to say that a division could only take effect as to those individuals who should consent to it, and must be wholly ineffectual as to others, would not only change its character from an organic or territorial dismemberment, to a mere numerical or individual separation, but would frustrate one of the most useful objects of the power, by producing that confusion and discord, the avoidance of which is a just ground of its exercise.

In a measure of this kind, affecting the feelings if not the interest of numerous individuals, a diversity of sentiment may be expected even in the clearest case. Founded as such a measure should be, upon an enlarged view of both the general and local interest, these individual diversities must necessarily be merged in the general sense of interest and propriety to be ascertained by the voice of the majority of those concerned, to which the minority must yield, or by the action of the legitimate authority, which must be binding upon all. That the General Conference had a right to act for the whole Church in authorizing the separation and independence of the Southern Conferences, has been already sufficiently shown. And if that body might not also act for the part proposed to be separated, it has by the resolutions under consideration, recognized if not established the competency of the several Annual Conferences to decide the question for the portions of the Church within their respective jurisdictional limits. We are not to decide whether, in point of policy or discretion, it might have been better to refer the question, in each Conference, to the determination of a majority of the individual mem-

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bers attached to it, but whether, according to the principles of the association, such a reference was essential to the validity of the separation. Without entering into any detailed discussion of this question, which is perhaps not relied on, it is enough to say that we have found nothing in the history or practice or constitution of the Methodist Episcopal Church, to prove that on this or any other question affecting the general legislation or organization or action of the Church, the individual members were or are entitled to any direct voice or control. On the contrary the power of the Church, not only under the constitution but over it, resides in the ministers and preachers of the Church, to be exercised in their General and Annual Conferences; and the other officers or private members exercise only such portions of local power as are vested in them by the legislation of the preachers. It was the preachers who framed the organization and constitution of the Church, in virtue, not of a power delegated by the individual members, but of a power original in themselves or derived from ordination as preachers. They have reserved to themselves the right of overcoming or dispensing with the restrictions which they imposed upon the delegated General Conference, of which they and not the individual members, are the constituent body. And unless the preachers have, in some manner, lost a portion of their original power, they can change or unmake what they have constructed; and at any rate, upon the dissolution of the general organization which holds the several Annual Conferences in union, the elementary power would still be in the preachers, who might, by entering into General Conferences more or less extensive, re-construct one or more organizations, according to their own sense of the interests of their respective charges. From their official and personal connection with the different societies, the preachers should be presumed to know and sympathise with the wants of these bodies and their members, and would doubtless be disposed to represent them truly, and to provide for them as far as the general interests would allow. But whether on this ground or not, the body of preachers have power to act for the body of members, and there is no where in the

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GIBSON *et al.* vs ARMSTRONG, &c.

system, any provision for ascertaining or effectuating the will of the members upon any general measure except through this agency of preachers, who are neither chosen by, nor responsible to them. It would seem clear, therefore, that there was no violation of the principles of the Methodist Episcopal association, in referring the question of separation to the decision of the preachers in their Annual Conferences. And although one or more Annual Conferences might be incompetent by their separate action, against the consent of the General Conference, to bind to an independent organization, the local societies connected with them, we are satisfied that the joint and co-operative action of the General Conference and the several Annual Conferences concerned, was fully competent to determine the question and fix the limits of separation, and to establish over the several societies within those limits, the jurisdiction of the new organization. The reference to the vote of the members for fixing the position of the border societies, though according to these views unnecessary and anomalous, yet being made by the authority of the General and Annual Conference, was unquestionably valid, and the decision of the majorities acting under it has the same authority as that of the Annual Conferences themselves.

VIII. But it is objected that the proceedings which have resulted in the erection of a southern organization, have not been such as under the resolutions, give to that organization the sanction of the General Conference. Without detailing the particular grounds of this objection, we shall proceed to answer them, premising that in determining upon the legality of the actual state of things consequent upon a great movement of this character, every part of the proceeding should be liberally construed to effectuate the apparent and reasonable intention of the parties, and there is no room for technicality. Then it is apparent upon the face of the resolutions that there is but one condition upon which the separation and the sanction of the General Conference are to depend, which is that the delegates from the slave-holding Conferences should find it necessary to erect an independent ecclesiastical connection, &c. The distribution of the book

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concern and chartered fund is obviously intended to be a consequence of the separation and not a condition on which it is to depend. And the reference to the several Annual Conferences for a modification of the restrictive rule, was evidently for the purpose of authorizing the intended distribution, and not of authorizing the separation. The slave-holding Conferences referred to in the first resolution, are such as were situated wholly in the slave-holding States. And the delegates from all of these Conferences assembled in convention, having declared the necessity of separation and erected an independent ecclesiastical connection, the prescribed condition has been complied with. Even if the resolutions intended as the condition, that the delegates from the slave-holding Conferences then present in the General Conference, should find it necessary, there is no doubt that those delegates did deem it necessary; that they promoted the movement in favor of it, were members of the convention which declared it necessary, and concurred in the act. But we do not understand the resolutions as referring specially to these delegates, whose authority as such would expire with the session of the Conference, and who had no power under that authority, to erect an independent ecclesiastical connection for their constituents. As to the actual necessity for separation, that is, the existence of such a state of things as justified it or rendered it proper, this, if it could ever have been a judicial question, is no longer so. It has been decided by the concurring judgment of the General Conference and the southern or slave-holding Conferences, to which it was referred; and by the fact itself of an actual separation, by agreement between the whole, and the separating part which is presumptively the strongest evidence of a high expediency amounting to necessity.

The Annual Conference of Kentucky having elected to adhere to the Methodist E. Church South, the local society at Maysville, by the act of the Ky. Conference, was placed in the

But the separation having, as we have seen, been effected by competent powers in the Church, and under the condition and in pursuance of the plan prescribed by the General Conference, its legality in view of the civil tribunal, can be in no degree dependent upon the sufficiency, in point of discretion or policy, of the causes which led to it. It is sufficient that the Church, through its

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GIBSON *et al.* vs ARMSTRONG, &c.

same connection had not the border Churches been allowed to determine their own position by a vote of the society.

competent agents, has authorized the separate organization and independent self-government of the Southern Conferences, and that they have so acted under the authority, as to clothe their movement with the sanction of the Church. This being so, the southern Church stands not as a seceding or schismatic body, breaking off violently or illegally from the original Church, and carrying with it such members and such rights only as it may succeed in abstracting from the other, but as a lawful ecclesiastical body, erected by the authority of the entire Church, with plenary jurisdiction over a designated portion of the original association, recognized by that Church as its proper successor and representative within its limits, commended as such to the confidence and obedience of all the members within those limits, and declared to be worthy of occupying towards them the place of the original Methodist Episcopal Church, and of taking its name. Such, though not the express language, is the plain and necessary import of the resolutions, in authorizing the formation of a southern ecclesiastical connection or Church, and prescribing a rule for ascertaining its limits; in leaving to the unmolested care of the anticipated Southern Church, all the societies, &c., within its limits, and stipulating that within those limits no new ones shall be organized under the authority of the Methodist Episcopal Church; in declaring that ministers may take their place in the southern connection without blame, and in denominating the Southern Church "the Church South." The provision made for a rateable distribution of the funds of the Church, and the relinquishment of all claim to the preaching houses, &c. within the limits of the southern connection, are of a similar character with the other features of the resolutions, and attest the equity and magnanimity of the late General Conference. That body had, however, no proprietary interest in the preaching houses, and could only transfer its jurisdiction over them, which is done by the resolutions and the proceedings under them.

The result is, that the original Methodist Episcopal Church has been authoritatively divided into two Methodist Episcopal Churches, the one North and the other

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South of a common boundary line, which according to the plan of separation, limits the extent and jurisdiction of each; that each within its own limits is the lawful successor and representative of the original Church, possessing all its jurisdiction, and entitled to its name; that neither has any more right to exceed those limits than the other; that the Southern Church retaining the same faith, doctrine and discipline, and assuming the same organization and name as the original Church, is not only a Methodist Episcopal Church, but is in fact to the South, the Methodist Episcopal Church, as truly as the other Church is so to the North, and is not the less so by the addition of the word South to designate its locality. The other Church being by the plan of division, as certainly confined to the North as this Church is to the South of the dividing line, is as truly the Church North as the Southern Church is the Church South. The difference in name makes no difference in character or authority.

IX. The application of the deed to this state of things has already been explained; and it only remains to ascertain to which of these Churches the Maysville society, according to the plan of separation, belongs. The Annual Conference of Kentucky having adhered to the Southern connection, the Maysville society as a part of that Conference, would by that adherence have been placed in the same connection, had not the border societies been allowed to determine their own position by a vote of their members. The reference of the question to a vote, implies that according to common usage, the vote should be taken at a meeting of the members of the society. But the resolution having omitted all detail, these were supplied by the recommendation of the Bishops, who presented a plan of proceeding altogether proper, and according to the intent of the resolutions. In pursuance of this plan, a meeting of the Maysville society was held after due notice, and nearly all of the ascertained members of that society having been present, a majority decided in favor of remaining with the Kentucky Conference, in connection with the Southern Church, which was duly certified to that Conference. This meeting having been held upon regular notice, un-

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GIBSON *et al.* *vs* ARMSTRONG, &c.

der the authority of the entire Church, and for a lawful purpose well understood, and having been in fact unusually large, it might be assumed, upon ordinary principles, that those who did not attend were willing to submit to the decision of those who did, and that the vote of the majority present was the vote of a majority of all. For it is to be observed, that the resolutions do not give those who are absent to the vote on one side more than of the other, but require the decision either way to be by the vote of a majority. But the opinions of those who were absent from the meeting in this case having been canvassed, and it appearing that the actual majority of all the members concurs with the vote of the majority of those who were present, there is no room for further question or presumption.

The members of the Maysville society having determined by a majority, under the plan recommended by the Bishops, to adhere to the M. E. Church South, the ministers furnished by that organization and those adhering to that connection, have the right to the exclusive use of the church property.

The members of the Maysville society of the Methodist Episcopal Church, have then, by the vote of a majority, placed that society in connection with the Southern division of that Church, and of course in subordination to its authority and jurisdiction. They have done this under the authority of that Methodist Episcopal Church, of which both the majority and minority through their membership in this society were members, and to which all once owed obedience. They have done it lawfully and without blame in the eye of the Church. The position in which they have thus placed the Maysville society, is therefore its lawful position, and neither the society itself, nor its members, are deprived of any right by this lawful act, which at least was not a rejection of their original condition, since the original Church had already been divided, but a choice between the two Churches which stood in its place, and a choice which resulted in retaining the Maysville society in the same Conference with which it had long been connected. The Kentucky Conference having been lawfully made a part of the Southern organization, it was only under the privilege conferred by the resolutions and by the vote of a majority of the Maysville society, that that society could rightfully have been taken out of the Kentucky Conference and placed in connection with a different organization. The majority having determined against such a

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change, the minority certainly could not effect it by their own will, and the society remains rightfully within the limits and jurisdiction of the Kentucky Conference, bound under the authority of the rules and discipline, and of the General Conference, to receive its preacher from that source. That the resolutions constituting the law of the case, intended that the ministry should acquiesce in the determination of the majority, is manifest, not only from their general tenor and objects, but more especially from the failure to make any provision for a seceding minority, and from the express stipulation that the Church to which such minority might desire to adhere, shall organize no societies within the limits of the other.

The minority having by their assent to the vote, and submitting the question to the decision of the majority, acknowledged legitimacy of the mode of determination by a majority, are estopped to deny the authority of the tribunal to which they submitted, and having now separated from the majority, they have no right to the use of the property for any portion of the time for religious purposes.

Had the minority acquisced in the present instance, and remained in the society in which they had taken, and held their membership, it could not have been doubted that notwithstanding the division of the Church, and the adherence of the Maysville society to that portion which assumes the name of "the Methodist Episcopal Church South," (and not to that part which retains the name of "the Methodist Episcopal Church,") the entire society and its members would have been the true beneficiaries under the deed, entitled to the use of the property conveyed by it, beyond the power of disturbance by the present M. E. Church or its members. By attending the meeting and going into the vote, all who did so recognized the authority of the resolutions under which the proceeding took place, and submitted the position of the society to the result of the vote by which themselves and the society were placed in connection with the Southern Church. This implication of consent and of promised acquiescence in the determination of the majority, renders more obvious the conviction that the minority could not by their subsequent separation from the society, change its character or position, or impair the rights of its members. These, however, were fixed, not by the concession or acquiesence of the minority, but by the authority of the General Conference of the Methodist Episcopal Church, and by the action of the society under that sanction. And the minority having separated from the society and formed a new organization not authorized by

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GIBSON *et al.* *vs* ARMSTRONG, &c.

the General Conference, but in defiance of the rule which it had prescribed for the case, and having rejected the preacher from the Kentucky Conference, to which the society legally belongs, and taken one from the Ohio Conference, to which it does not belong, it is clearly the minority and not the majority, that in view of the law of the Church, is in an illegal attitude. The individuals of the minority had the undoubted right, as individuals, to quit the society of which they had been members, to reject the Church with which they had connected themselves, and to form a new society, under such connections or protection as they might find willing to receive them. If they could have done this without violating the law and authority of the Methodist Episcopal Church to which the entire society was subject, they would still have lost thereby, all rights belonging peculiarly to that society and its members; and much more when they have done it in violation of the law of the Church. Having separated from the majority on the very ground of unwillingness to maintain the true position, relations and subordination appropriate to the entire society, and which are maintained by the majority, the minority can have no just pretension to be regarded as being itself the true original society, or a lawful continuation of it, but the majority is manifestly entitled to be so considered. And the property conveyed and held for the use of the members of the original society, as members of the Methodist Episcopal Church, having by the deed, been subjected to the same authority and laws to which the society and its members entitled to the use were subject, it follows that the same legislation and the action under it, which have determined the true position and relations of the society entitled to the use, have also determined the authority to which the use itself is properly subject, and have placed the use under the jurisdiction and legislation of the Southern Church. Whether the society instituted by the minority has been or shall be regularly received in connection with the present Methodist Episcopal Church, and whether its members have continued to be or shall become members of that Church, is immaterial to the question of property now involved, nor is it deemed essential to inquire how

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Tat the present Methodist Episcopal Church is identical with the original Church of that name. It is sufficient for the purposes of this case to have ascertained that the Methodist Episcopal Church South has, within the limits of its organization as fixed under the rule prescribed by the General Conference of the original Church, all the rights and jurisdiction of that Church, to the exclusion of the present Methodist Episcopal Church; that the Maysville society, and property secured to its use for worship, are under the jurisdiction, not of that Church, but of the Methodist Episcopal Church South, and that while one of the parties now contending, submits to that jurisdiction and would hold the property in subordination to it, the other repudiates it and would place the property in subjection to a different authority. It has already been sufficiently shown, that the addition of the word, South, to the name of the Southern Methodist Episcopal Church cannot affect the rights either of that Church or of its members, and that the members of a local society entitled to the use of local property under this or other similar deed before the division, do not lose their right by adhering to the Methodist Episcopal Church South, under the resolutions of the General Conference of 1844. Without further recapitulation, we conclude that the majority of the Maysville society, with their preacher from the Kentucky Conference, is entitled to the use of the property in contest, to the exclusion of the minority, whose members would, as we understand, be willingly admitted to the common use of the premises as members of that society, but have no proprietary right as a distinct and independent body.

The decree is reversed and the cause remanded, with directions to render a decree declaring the exclusive right to the use of the lot in question, and of the buildings thereon, and especially of the house erected thereon for the purpose of divine worship, to be in the defendants and their associates, constituting the Methodist Episcopal Church or society at Maysville, adhering to the Methodist Episcopal Church South, with their preacher appointed to preach therein, under the authority of the said Methodist Episcopal Church South, and not in the complain-

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ABEL vs WILDER & Co.

ant and those represented by him in their organized form, as constituting a society or congregation professing adherence to the Methodist Episcopal Church; and thereupon to dissolve the injunction herein, and to dismiss the bill, thus leaving the defendants and their society in possession, as they were when the bill was filed.

Robertson, Hord and Stanton for Gibson, &c.; *Waller and T. M. Smith* for Armstrong.

PET. & SOM.

Abel *vs* Wilder & Co.

Case 128.

ERROR TO THE JEFFERSON CIRCUIT.

Sale of equity of redemption. Mortgagor and mortgagee. Pleadings.

August 2. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated and pleadings.

THIS was an action by petition and summons, brought by Abel, assignee of Wm. Bull, against Wilder & Co. The note was dated the 1st of March, payable in three months, and assigned on the day of its date. The defendants pleaded in substance, that the note was given for rent of premises from the 1st of March, which had been previously mortgaged by Wm. Bull to the plaintiff, and that on the 3d of March, the equity of redemption was sold under execution, and purchased by Nimrod Bull for $431, and a conveyance made to him by the Sheriff; that N. Bull thereupon took possession of the premises and the defendants acknowledged his right of possession and held under him, and Wm. Bull on the 7th of March, conveyed to him all his right to the property and rents; that when the note sued on became due, N. Bull was entitled to receive the said rent, and being so entitled, transferred it to them and discharged them from the same. A replication to two pleas, (3 and 4,) containing substantially the same matter, was adjudged bad on demurrer, and the plaintiff having made no further answer, judgment was rendered for the defendants.

The pleas rest upon one or both of the two following propositions, viz: 1st. That the purchaser of the equity of redemption in land at execution sale, is entitled to the

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immediate possession as against the mortgagor, and may, by entering, break up a lease made by him after the levy of the execution; and 2d. That either the sale and conveyance by the Sheriff, or the subsequent conveyance by the mortgagor, carried with it the right to the subsequently accruing rent, though secured by note previously assigned to a third party.

The purchaser of an equity of redemption under execution against the mortgagor, is entitled to possession, as against the mortgagor, and may maintain ejectment: (8 *Dana*, 198; 2 *B., Monroe*, 63.)

The opinions of this Court in the cases of *Dougherty* vs *Lynthicum*, (8 *Dana*, 198,) and *Martin* vs *Shelton*, (2 *B. Monroe*, 63,) are referred to in support of the first proposition. The opinions in both cases affirm the right of the purchaser of the equity of redemption under execution, to maintain an action of ejectment against the mortgagor, and assert that the right of possession as against him, is transferred by the Sheriff's sale and conveyance. But it is obvious that this general principle as to the effect of the sale and conveyance was stated without particular reference to the precise time when the purchaser might enter or maintain his ejectment. In the case of *Martin* vs *Shelton* it does not appear when the sale was made or the action commenced, but the reference made to the defendant's right of redemption, and his unsuccessful attempt to redeem, would seem rather to authorize the inference that the time for redemption, viz: one year from the sale, had expired before the commencement of the action. In the case of *Dougherty* vs *Lynthicum*, it appears from the preliminary statement of the facts, that the action was commenced within a few days after the sale. But although the dates of these facts are there stated, they are not again referred to in the opinion; and it is manifest that no question was made with reference to the time when the plaintiff's right of possession accrued, or might be asserted. The general proposition advanced and decided in the two cases, and which was new in this State, is that in the particular instance of an execution sale of an equity of redemption, the purchaser becoming, by the sale and deed, invested with the right of the mortgagor, was, as against him, entitled to the possession, and could maintain an action at law for its recovery. The affirmance of the principle without qualification, implies it is true, that the Court

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ABEL
vs
WILDER & CO.

did not then perceive that it was subject to qualification. No question having been made with respect to the time when the right might be asserted, it cannot be assumed that the attention of the Court was directed to any such question, and the mere failure in the opinion to give effect, as a qualifying circumstance, to a particular fact appearing in the case, but not relied on, though it may authorize the inference that the fact was not regarded as one which should affect the general proposition, does not prove that it was considered at all, and therefore, cannot be taken as a judicial decision, denying all effect to it.

—But the purchaser cannot assert that right by action of ejectment, nor is he entitled to the possession or to the rent until the time for redemption has elapsed.

The opinions referred to are, therefore, entitled to but little, if any weight upon the question when the purchaser of an equity of redemption under execution, becomes entitled to the possession as against the mortgagor. Neither of them decides the question. But the opinion in the last of the two cases, (2 *B. Monroe*, 64,) indicating as the basis on which the general proposition is founded, that the statute authorizing the sale, should be understood as giving such a right or remedy as will effectuate the intended advantage to the purchaser, refers us to the statute for ascertaining the proper advantage which should result from the sale, and virtually subjects the right or the remedy for its effectuation to such limitation or qualification, as a fair construction of the statute may require.

Upon reference to the execution law of 1828, sections 30 and 31, (1 *St. Law*, 650–51,) and sec. 36, (1 *St. Law*, 653,) we are of opinion that the right of redemption within twelve months, allowed by the two first sections to the defendant in execution, whose land is sold for less than two thirds of its value, and by the last named section, allowed in case of the sale of an equity of redemption in land, without reference to value, operates as a suspension of the purchaser's right of possession, which the sale and conveyance might otherwise confer, and that he has no right by virtue merely of the sale and conveyance by the Sheriff, to enter on the possession of the mortgagor, or to maintain an ejectment against him or his tenant, until the period for redemption has expired. A careful consideration of the 36th section, providing for the sale of the mortgagor's interest, in comparison with the 30th

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and 31st sections, which give and regulate the right of redemption without reference to any mortgage, and especially in comparison with the 7th section of the act of 1821, (1 *Stat. Law*, 654, *in a note*,) which first subjected the equity of redemption to sale under execution, satisfies us that the legislature did not intend that the sale of the mortgagor's right under execution, should operate to divest him of the possession until the time for redemption should be passed. We therefore do not admit, but deny the first proposition involved in the pleas.

Neither the sale and conveyance by a Sheriff, of an equity of redemption nor a subsequent conveyance by a mortgagor, carries with it the right to subsequently accruing rent secured by note previously assigned to a third person.

The second proposition in both of its branches, seems to be virtually negatived by the opinion intimated in *Castleman* vs *Belt*, (2 *B. Monroe*, 159,) that the purchaser of an equity of redemption does not, by such purchase, acquire as incident to that interest, a legal right to the rent reserved by the vendor and accruing after the purchase. But if this opinion be not correct, and if it be conceded that the purchaser of the equity under execution might after the expiration of the year, without a redemption from his purchase, and without an assertion of the right of possession by the mortgagee, gain the possession and recover the *mesne* profits from the time of the conveyance to him by the Sheriff, it is still clear that the entire effect of his purchase would be defeated by a redemption within the year, and that although it would not be entirely defeated by the assertion of the mortgagee's right of possession, it would be thereby postponed, so far as regards the right of possession, and reduced to the mere right of redeeming the land from the mortgage, or taking what should be left after satisfaction of the mortgage debt. The pleas show, it is true, that the mortgagor's right of redeeming his equity of redemption from the execution purchaser, was released on the 7th of March; but this voluntary act could not affect the existing rights, either of the mortgagor's lessee, or of his assignee of the note for the rent, any more than the voluntary surrender of possession by the lessee to the execution purchaser, who had no right to the immediate possession by virtue of his purchase, could affect the right of the assignee of the rent. And as notwithstanding the purchase, any contingent right to the accruing rent as

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ABEL vs WILDER & Co.

incident to it, was subject to the mortgagee's right of possession and of receiving the rents, we think the assignment to him of the note for the rent, was equivalent to admitting him to the perception of the rents and profits, and that his right being paramount, could not be defeated by any arrangement between the mortgagor and his lessee and the purchaser of the equity. Nor do we decide that if the note for the rent had been assigned to a stranger, his title could have been defeated by the facts alledged in the pleas, which do not present the case of a *bona fide* payment of the debt to the payee or his order, without notice of the previous assignment.

It is said, indeed, that the plaintiff though stated in the pleas to be the mortgagee, may not have received the assignment of the note for rent in that character, but in the absence of all averment to the contrary, the presumption on the face of the plea, is that he did so receive it, and we consider the case as thus presented. If the fact were otherwise, and were deemed material, it should have been stated by the defendants. For all that appears in the pleas too, the mortgagee may have taken the actual possession before the end of the year, or may have received the accruing rents except the portion secured by this note, and the purchaser of the equity may have been left exclusively to his remedy for an account and a redemption by payment of the mortgage debt.

Whether the execution purchaser of the equity had any right in virtue of that purchase, to the subsequent rents accruing during the year, and whether if he had, it could affect the right of any assignee of an outstanding note, given for a part of that rent, are questions which we do not decide. We are of opinion that the right of the mortgagee as assignee of such note could not be affected by any proceedings under the execution, or by subsequent arrangement between the mortgagor, lessee and purchaser, not amounting to a *bona fide* payment without notice, because his rights were paramount to the execution and to the rights of any of these other parties, and it follows that the pleas do not present a bar to his demand. We are inclined to the opinion that if the pleas were good the replication is insufficient. But under the view we have

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taken, this is immaterial, as on account of the pleas being insufficient, the defendant was not entitled to judgment, but judgment should have been given for the plaintiff unless the pleas were amended.

Wherefore, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the replication, on account of the defect in the pleas, and for further proceedings.

Pirtle & Speed for plaintiff; *Fry & Page* for defendants.

Ring, &c. *vs* Baldridge, &c.

DETINUE.

APPEAL FOM THE FULTON CIRCUIT.

Case 129.

Husband and wife. Remainder. Slaves.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court, *August* 3.

Case stated.

THOMAS MASON, by his will proved in 1812, devised the rest and residue of his estate, (which included a female slave, by name, Beck,) to his wife for life, and at her death to his daughter Harriet, then unmarried, and her heirs forever. After the death of her father Harriet married Kyle, by whom she had three children, the present plaintiffs, and Kyle having died, his widow intermarried with Baldridge, the defendant. Mrs. Mason, the devisee for life, held possession of Beck and her children until her death in 1845, when Baldridge, whose wife, the devisee in remainder was still alive, took them into possession. Upon which the children of Mrs. Baldridge by her first husband, brought this action of detinue for two male slaves, the children of Beck. The action was commenced even before the death of Mrs. Baldridge, the devisee in remainder, and mother of the plaintiffs.

A vested remainder in the slaves belonging to the wife, does not vest in the husband upon the marriage, & unless reduced to possession during the life of

Upon the facts stated, the interest of the testator's daughter in the slave Beck, was a vested remainder, and according to the decisions of this Court in many cases, that interest did not, upon her subsequent marriage, vest absolutely in her husband, but if the slave was not reduced to possession during the coverture, the interest,

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RING, &c. vs BALDRIDGE.

the husband, survives to the wife and not to the representatives of the husband. (1 *B. Monroe*, 152; 4 *Ib.* 236; 5 *Ib.* 556.)

unless disposed of before the death of either, vested in the survivor. This principle was recognized in the case of *Turner* vs *Davis' administrator*, (1 *B. Monroe*, 152,) upon the authority of previous adjudications there referred to, and has been regarded and acted on as the settled doctrine in the more recent cases of *Thomas, &c.* vs *Kennedy*, (4 *B. Monroe*, 236;) *Greer's heirs* vs *Boone*, (5 *B. Monroe*, 556,) and other cases. The right of the plaintiffs rests upon the contrary assumption that by the marriage of the devisee in remainder with her first husband, Kyle, her interest vested absolutely in him, and upon his death descended to his heirs; and while the authority of the cases referred to and of the rules established by them is not denied, it is attempted to withdraw this case from their operation, on the ground that by the act of 1800, (2 *Stat. Law*, 1546,) slaves, so far as respects last wills and testaments, are to be deemed real estate, and pass by will in the same manner and under the same regulations; and it is contended that the cases referred to do not decide the question as it arises under this statute, or do not give to it its proper effect.

It is to be observed, however, that the statute of 1798, (2 *Stat. Law*, 1476,) makes the general declaration that slaves shall be taken to be real estate, and shall descend to heirs and widows, &c., and that the question as to the rights of the husband marrying a woman who had a vested remainder in slaves, has been decided without any discrimination, founded on the manner in which the interest has come to her, whether by descent, by will, or by deed. In the case of *Turner* vs *Davis' administrater*, (1 *B. Monroe*, 152,) the title came to the wife by will. And although this question may not, in any of the cases, have been formally discussed and decided with reference to the operation of the act of 1800, above cited, yet the statute itself has received, in many cases, such a construction as establishes the principle that it does not make slaves real estate when devised by will, but only applies the same requisitions and gives the same effect in passing the interest to the devisee, to a will devising slaves as to a will devising land. We do not, therefore, regard the question now made upon the statute of 1800, as an open

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question, and if it were, we could not decide that after the interest in slaves had passed to the devisee, it continued to be governed by the laws of real estate in virtue of this statute. And even if this were conceded, the consequence would be that as the interest of the devisee, Harriet, never came into possession during the life of her first husband, but continued an interest in remainder until long after his death, it never vested in him at all, and therefore, did not descend to his heirs; but that it remained in the wife as a remainder in land would, until the termination of the life estate, when being reduced to possession, the second husband, if it was real estate, was entitled to enjoy it during the coverture. In which case the plaintiffs, as heirs of the wife, would have no right of possession until after her death, and therefore, could not maintain this action brought during her life. But we are satisfied that the effect of the statute is fully exhausted when the will itself has fully taken effect, and that it has no further control, either of the quality of the estate or of the course in which it shall pass, after it has vested according to the provisions of the will. It is true this construction operates in the present case, to deprive the heirs of the devisee in remainder of all interest in the estate, but the opposite construction that the interest in remainder vested absolutely in the husband by the marriage, would, in all cases, deprive the wife herself of it, and take it from her heirs as such. The concession that the interest of the wife, so long as it continued to be a remainder, and until it vested in possession according to the will, should be regarded as real estate, would not help the present case, because it came into possession according to the terms of the will, during the life of the wife, and the will then ceasing to operate, the slaves being in possession vested absolutely in the husband then living.

Wherefore, the judgment is affirmed.

Husbands for appellants; *Harlan and Bullock* for appellees.

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CASE.

Case 130.

Inman, Galt, &c. *vs* Funk.

ERROR TO THE JEFFERSON CIRCUIT.

Case. Negligence.

September 23. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THIS action on the case by Inman, Galt, &c., against Funk, is founded on the allegation that the plaintiffs being possessed of a flat boat loaded with coke, tied to the wharf at Louisville, and the defendant being possessed of another flat boat, &c., the defendant did, by himself and servants, manage and control his boat so carelessly, that it ran against the plaintiff's boat, whereby she was sunk and the coke lost, &c. The collision occurred in removing the defendant's boat from a position above to one below that of the plaintiff's boat, in doing which the defendant's boat necessarily passed outside of the plaintiff's. Whether the collision was violent or not, and whether it occasioned the sinking of the plaintiff's boat, are matters as to which there is some discrepancy in the evidence upon which it was the province of the jury to decide. But there was evidence conducing to prove that the plaintiff's boat was not so strong as boats ordinarily are in which coke or coal is transported on the Ohio river, and the principal question in the case is as to the effect to which this fact should be entitled in determining the liability of the defendant or the degree of diligence to which he was bound in removing his boat.

It is the duty of those conducting boats on navigable streams to use all reasonable care and effort to avoid damage to, or collision with other boats, whether they be weak or strong; the weakness of the boat injured by collision, where there

As the plaintiff's boat was lying fastened to the wharf, and the defendant, in removing his boat from above, was placing her in a situation which required care and effort to keep her from striking the boat of the plaintiffs, from the mere force of the current, the duty of using this care and effort devolved upon the defendant, and the plaintiffs were only bound, in case the danger of collision became apparent, to use such reasonable means as might then have been in their power, to avoid it or to mitigate its consequences. But it was the duty of the defendant to use

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all reasonable care and effort, not merely to prevent damage, but to prevent collision. He had no right to run against the plaintiff's boat, whether it was strong or weak, and he is liable in either case, for the consequences of a collision, which he might and ought to have avoided. Though it may be true that if the plaintiff's boat had been the strongest of the two, it might not have been seriously injured by the collision, it is entirely certain that if there had been no collision, there would have been no injury from that cause, however weak the boat might have been. The weakness of the plaintiff's boat, as it rendered it the more liable to injury from collision, called for greater precaution on the part of those who knew the fact. If the defendant did not know it, he was still bound to use the means proper to prevent collision, and if it occurred without the use of such means on his part and without fault on the part of the plaintiffs, the greater damage consequent upon the weakness of the boat, must fall upon the defendant. A boat which is strong enough to freight a full cargo of coke from Pittsburg to Louisville, must be strong enough to be entitled to the protection of the law while lying quietly at the wharf at the latter place. That protection consists in the requirement that other boats shall not run upon it; and that those who voluntarily place other boats in a condition to be driven against it by the current, shall use the proper means and efforts to prevent a collision.

is a want of due care, will afford no protection to the defendant, but require an increased care.

The question is not whether as many men were employed in removing the defendant's boat as are usually employed for such a purpose, nor whether they removed it in the ordinary way, but whether, considering the state of the river and the situation of the two boats, proper means were used by the defendant and his agents to avoid or prevent a collision. And by proper means, we intend, such precautions and exertions directed to the prevention of collision as under the circumstances, would have been deemed sufficient by men of ordinary vigilance and prudence, and such as would, in all reasonable probability, have succeeded, but for some unforeseen circumstance or accident, which men of ordinary prudence and care could not have been expected to guard against. If the defend-

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YOUNG vs MILLER.

ant knew of the weakness of the plaintiff's boat, he was bound to use extraordinary vigilance and care to avoid collision.

The instructions given by the Court, and especially under the qualification that the insufficiency of the plaintiff's boat to stand the necessary and ordinary collisions, might relieve the defendant from responsibility to some extent, do not, according to the foregoing view, contain a fair exposition of the law, and were calculated to mislead the jury as to the duty and liability of the defendant.

Wherefore, the judgment is reversed and the cause remanded for a new trial.

Pirtle & Speed for plaintiffs; *Boone* for defendant.

CHANCERY.

Case 131.

Young *vs* Miller.

ERROR TO THE BOURBON CIRCUIT.

Usury. Forbearance. Cash notes.

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September 23. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.—Judge Simpson did not sit in this case.

Case stated.

THIS bill was filed to recover usury alledged to have been paid by Young to Miller in various transactions. Neither of the parties appear to be entirely accurate in his statement of the facts. But as gathered from the pleadings and the testimony of the only witness who deposes, and who seems to have made the calculations at the request and in the presence of the parties, and has appended to his deposition the written statement and calculation by which they settled, the case is in substance as follows: In the year 1840, Young sold to Miller a tract of land, to be paid for in four instalments of nearly $2,400 each, falling due on the 1st day of March, in the year 1841, and in each of the three following years. Before the first instalment became due, Miller advanced some small sums to Young and also paid sundry debts against him, and acquired several notes or other demands upon him. Some time after the first instalment fell due, a settlement was had, in which Miller made a statement

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of his advances as above, and interest at the rate of twelve per cent. per annum was calculated on the several sums from the time of the advance up to the maturity of the first instalment. The credits of Miller thus ascertained, extinguished the first instalment and left an excess of near $1,100, which being reduced by some small demands which Young held upon him, to about $850, interest at the rate of twelve per cent. per annum was calculated on this sum for one year, up to the maturity of the second instalment, and a large sum being added as the price of mules sold by Miller to Young, the credits of Miller, including the twelve per cent. exceeded and extinguished the second instalment, leaving a balance of nearly $400 in his favor; on which sum and also on $200 attached in Miller's hands by a creditor of Young, interest was calculated at the rate of twelve per cent. for one year, to the maturity of the third instalment, and the aggregate making $121 47, was deducted from the third instalment.

The allegation of Miller that his advances were made under an agreement with Young, that he should be allowed twelve per cent. per annum thereon in his land debt, is denied by Young, and there is no proof on the subject, except that interest at that rate was allowed in the settlement as above stated. No question therefore, arises as to the effect of such agreement. But the sole question is, whether as the demands held by Miller against Young, with the twelve per cent. interest thereon, were extinguished by credits upon Miller's debts to Young, in the manner above stated, the transaction is to be regarded as usurious.

A debtor may purchase debts due from his creditor to others at a greater discount than legal interest and demand a set-off to the full amount with legal interest.

It is contended that this is the mere anticipation of the payment of his own debt by Miller, and that as any other person might have bought his notes at a greater rate of discount than six per cent. per annum, so should he be allowed to buy them at a greater rate of discount, or to pay them at a greater rate of interest upon the sum paid. We are not prepared to say that a debtor may not purchase his own debt, or any part of it, or discharge it before it becomes due, at a greater rate of discount, or at a higher interest than six per cent., if the advance is in

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YOUNG vs MILLER.

good faith made and accepted as a purchase or payment of his debt, and if the credit given to him was not a device to cover the usurious interest upon his advances, to be made before his debt should become due. Nor is there any doubt that the debtor, before his own debt becomes due, may purchase up the notes or debts of his creditor, at the same discount which would be allowed to any one else, and demand a set-off for the full amount of such debts, with legal interest, until his own debt should become due. But to say that he may charge more than legal interest upon the debts thus purchased against his creditor up to the maturity of his own debt, is giving him an advantage which is denied to the original holders and to any other purchaser of the same debt; and we see no good reason for this preference.

—Creditor may pay off his own note before due, discounting more than legal interest, and it will not be usurious, unless done with a view and intent to evade the laws against usury.

It is going far enough to say that the purchaser, on payment of a note by the debtor himself before it is due, at a discount greater than the rate of six per cent. for the time the note has to run, or for a sum on which a greater rate of interest is charged for the same time, as a means of ascertaining the extent of the purchase or of the payment, is not usurious. There being, however, neither a loan nor the forbearance of a debt, if the transaction is in good faith either a purchase or a payment, the prohibition of the usury laws does not directly apply. And such transactions have been sustained, unless they appear to have been resorted to for the purpose of evading those laws. But one who holds a note on another, whether as payee or assignee, or one who advances money to or for another, not operating at the time as the payment of a debt, becomes to that extent, the creditor of that other. From the time the purchased note becomes due, or from the time the advance is made, there is a debt which may be forborne. And if in a subsequent settlement, more than legal interest be charged and allowed from the maturity of the note, or the time of the advance up to the settlement, and the aggregate amount is then paid either in money or by the transfer of a note of like amount then due upon a stranger or upon the claimant himself, or by a credit of that amount as being then paid upon his note, or by surrendering his note of

—But if a purchaser of a note charge the payee after the note becomes due, a greater rate of interest than 6 per cent. and it be paid whether in money, his own notes, the note of a stranger of like am't. then due, the transaction is usurious, as exacting more than legal interest for forbearance.

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the same amount then due, in either case the transaction is clearly usurious, as involving the exaction and payment of more than legal interest for the forbearance of the debt. Suppose then, the party upon whom the claim is made for payment of his debt over due, offers in discharge the note of a third person not due for six months, and the excessive interest upon his own debt being carried on to the maturity of this note, the aggregate of debt and interest thus ascertained, is discharged by a transfer of the note of precisely equal amount, is not the transaction, in intent and effect, and legal character, the same as if it had not in fact occurred until the end of six months? True, by the result of the transaction as above stated, the original debtor is discharged at once by the transfer of the note on another in payment, but before arriving at this result, and as a means of attaining it, and of ascertaining how much he is to pay, his debt is treated as subsisting up to the maturity of that which is offered in discharge, interest is charged for its forbearance up to that time, the creditor does not really receive payment nor realize the amount until that time, and the debtor parts only with the right to demand the amount from a third person at that time. There is then, as it seems to us, a substantial forbearance of the debt from the time it was due up to the maturity of the note received in discharge, and a charge of excessive interest for this forbearance for the whole time which makes the whole usurious. If legal interest only were charged upon the original debt up to the time of the transfer, it might perhaps be assumed that the charge of excessive interest afterwards up to the maturity of the debt offered in discharge was resorted to merely as a mode of ascertaining the discount to be made on that debt, or the extent of interest to be acquired in it. But the illegal intent of extorting usurious interest upon the original debt being manifested by the charge for past forbearance, and being carried out and effectuated by continuing the charge for the future, and the transaction being entire, there is no ground for discrimination in favor of one part of it, which might if it stood separately, be innocent, but the whole must be regarded as covered by one illegal design, and as

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YOUNG vs MILLER.

being subject in every part to one condemnation. The usurious intent being clearly manifested, and certainly effected by the entire transaction, it would be inconsistent with the objects and policy of the laws against usury, to relieve from their denunciation one part of the arrangement, merely because if there had been no illegal intent, that part might not have been unlawful.

A creditor receiving his own note due in future, at discount of more than legal interest in payment of a debt then due from the payor, is usurious.

If the debtor instead of transferring in payment the note of a third person, transfer or credit the note of his creditor, due at a future time, the case seems to come clearly within the principles which have been stated, and is perhaps more clearly usurious, since in such an exchange of notes there should be no difference of their estimated value between the parties, except in reference to the time of payment, and the creditor receiving his own note, will certainly realize the excessive interest charged on the other. The case of excessive interest charged upon advances and paid by a transfer of the creditors own note, due in future, or by a credit on it, stands also on the same ground.

We are of opinion, therefore, upon the facts of this case, that the entire excess of interest charged by Miller and allowed or settled by crediting or extinguishing the several instalments of Miller's land debts or his other debts to Young as evidenced by the statement annexed to the deposition of the witness, Bryan, is to be regarded as usury paid, when said debts were respectively due, and that the complainant is entitled to a decree therefor, with interest from the commencement of this suit.

Wherefore, the decree dismissing the bill is reversed, and the cause is remanded for a decree as above indicated.

G. Davis for plaintiff; *Hawes* for defendant.

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Hays *vs* Younglove.

CASE.

ERROR TO THE CHRISTIAN CIRCUIT.

Case 132.

Trespass. Case. Malicious prosecution.

JUDGE BRECK delivered the opinion of the Court.

September 23.

THIS was an action on the case, brought by the plaintiff against the defendant in error. The declaration contains two counts. The first alledges that the defendant maliciously and without probable cause, went before a Justice of the Peace and made oath that the plaintiff did, on a certain day, cut down trees and carry off the same, from the land of the defendant, said land and timber being at the time, in his, the defendant's possession; and that upon his said oath, maliciously and without probable cause, procured the said Justice to issue his warrant, directed to the Sheriff, for the apprehension of the plaintiff, and maliciously caused the Sheriff to arrest and take him before the Justice, and to be imprisoned, and from which he was duly discharged upon executing bond for his appearance at the Circuit Court. He alledges his appearance at said Court, and that he was fully discharged and acquitted thereby from said warrant, and charge.

Case stated.

The second count contains substantially the same allegations as the first, with the additional allegations that the land upon which the alledged trespass was committed, was claimed by and in possession of the plaintiff, which was known to the defendant.

A demurrer was filed to each count, and sustained, and the plaintiff has brought the case to this Court.

That the plaintiff was entitled, from the facts alledged in the declaration, to maintain his action, we have no doubt. The only question is, whether he should not have sued in trespass, instead of case. It is manifest the Justice had no jurisdiction to issue the warrant, and that trespass could be maintained. But it has been held that when the proceeding be malicious and *unfounded*, though

Where a proceeding is *malicious and unfounded*, though instituted before a Court having no jurisdiction, either trespass or case may be maintained: (1 *Chitty*, 153;) *Morris* vs *Scott*, (21 *Wendell.*)

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WHITE vs BUCK.

instituted in a Court having no jurisdiction, either trespass or case can be supported: (1 *Chitty*, 153;) *Morris* vs *Scott*, (21 *Wendell.*) In the case referred to, it is said, "taking the authorities together, they give a decided countenance to an action on the case, though there may be a total want of jurisdiction, provided the *malice and falsehood* be put forward as the *gravamen*, and the arrest or other act of trespass, be claimed as the consequence." The case before us is of that character, and we are of opinion that the declaration is good.

Wherefore, the judgment is reversed and the cause remanded, with directions to overrule the defendant's demurrer and for further proceedings.

Buckner and McLarning for plaintiff; *Bristow* for defendant.

COVENANT.

Case 133.

White *vs* Buck.

APPEAL FROM THE CHRISTIAN CIRCUIT.

Assignments.

September 23. JUDGE SIMPSON delivered the opinion of the Court.

Case stated. THE plaintiff in error, as assignee of the following instrument of writing, brought an action of covenant thereon in his own name:

"I hold a certain note signed by Joseph M. Cheany and Joshua Corbin, for one thousand dollars, dated the 31st of December, 1841, and made payable the 25th November, 1843, drawn in favor of E. T. Mershon, and by him assigned to me the 7th February, 1842. Now I hereby promise, when the whole of said note of one thousand dollars is collected, to pay E. T. Mershon two hundred and seventy nine dollars and sixty six cents, and as it is a gratuitous offer to Mershon on my part, I am, according to the agreement, to have my own time and way to collect said note, and should the same never be collected, let the failure be under whatever circumstances, I am to be held in no way bound unto the said Mershon. The above amount to bear interest from the ma-

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turity of the note, and according to our settlement this day, I hereby release said Mershon from all responsibility growing out of his assignment of said note, should the money not be made. Given under my hand this 10th day of November, 1843. *Tho. M. Buck.*"

The defendant demurred to the declaration, and the Court having sustained the demurrer, the only question is, whether the foregoing writing is assignable so as to enable the plaintiff to maintain this action in his own name.

In the case of *Foree's administrator* vs *Thomasson*, (2 *Litt.* 167,) it was decided, that an instrument of a mixed character, stipulating to pay money, together with the performance of other things, was not assignable under the statute. The same doctrine was recognized in the case of *Boyd* vs *Rumsey, &c.*, (5 *J. J. Marshall*, 42,) where it is decided that a covenant to clothe a slave or pay his tax, and return him at the end of the term for which he was hired, is not a contract to pay money or property, and although containing also a stipulation to pay money, is not assignable.

The doctrine deducible from these and other cases of a similar character decided by this Court is, that a writing is assignable only when every portion of it is of an assignable nature. The contract is regarded as indivisible; it must, therefore, pass entire by the assignment or not at all. The writings embraced by the statute are only those which are wholly defined by the expressions, bonds, bills and promissory notes, whether for money or property. Unless the whole writing, in all its parts, is of a character consistent with this description, it is not assignable.

Writings are assignable only when the entire interest of the assignor can pass to the assignee, as bonds, bills and promissory notes, whether for money or property: *Foree's adm'r.* vs *Thomasson*, (2 *Littell*, 167; *Boyd* vs *Rumsey*, (5 *J J. Marshall*, 42.)

Testing the writing upon which this suit was brought by this principle, it is perfectly evident that it is not assignable. It contains a release of the assignor from all liability on the assignment. The benefit of that release would not pass to the assignee. It imposes on the obligor the duty of collecting the debt assigned to him by Mershon. It is true that he is to exercise his discretion as to the mode and time of its collection, but still, from the terms of the instrument, this duty devolves upon

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PILCHER, AS'EE. vs THE BANKS, &C.

him. The obligation for the performance of this personal service is not assignable. But were it conceded that the writing contains no stipulation for the collection of the debt, and therefore, imposes no personal duty on the obligor, still as it contains a release to the obligee, which could only operate in his favor, and is, from its very nature, not assignable, the character of the instrument would be the same and the same consequences would ensue, its assignment not authorizing the assignee to sue in his own name.

Wherefore, the judgment of the Court below is affirmed.

Bristow for appellant.

CHANCERY.

Case 134.

Pilcher, Assignee, *vs* the Banks, &c.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Bills of Exchange. Usury. Endorsers.

September 23.

JUDGE SIMPSON delivered the opinion of the Court.—Judge Marshall did not sit in this case.

The Banks are authorized by their charters to deal in bills of exchange, and the law has not fixed the rate of exchange, or limited the discount on bills purchased by them. It would be impracticable to do so.

WE concur in opinion with the Chancellor, that there is no usury in the various transactions between the Banks and these parties. The Banks are authorized by their charters to deal in exchange. The law has not fixed the rate of exchange at which they shall deal, or limited the discount in the purchase of bills by them, and from the very nature of this traffic, such limitations are wholly impracticable. The value of negotiable securities of all kinds must depend on many circumstances. Time, and place of payment, and the condition of the business operations of the country, all have their influence. Immense sums of money pass from one point to another in the shape of bills of exchange, and their value, from a thousand circumstances, must necessarily vary. The purchase of them is a mercantile operation of constant occurrence, and of vast importance, indispensibly necessary to the existence of commerce, and the encour-

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agement of trade and enterprize, and should not therefore be laid under any unnecessary restrictions.

A loan of money under color of buying a bill of exchange, upon which more interest than six per cent. per annum is taken, would no doubt be usurious. But there is a clear and well recognized distinction between a sale of a security and a loan of money. In any transaction on bills of exchange, the true test of its nature is determined by ascertaining whether it be actually a sale, or whether it assumes the appearance and character of a sale merely to cover an usurious loan. The question of usury is sometimes made to depend upon the attitude of the party on the bill who brings it into market, but this should be regarded only important, so far as it tends to illustrate the true nature of the transaction.

—But a loan of money, however, under pretext of buying a bill of exchange in which more than legal interest was charged, would be usurious.

Some of the Banks charged a larger premium, by way of exchange on bills payable at four months, than they did on two months bills, and it is contended that this is of itself conclusive evidence of usury. The argument is, that exchange has no reference to the time, but only the place of payment. That interest is taken for the time, and regulated by it, but exchange should be the same whether a bill has a long or a short time to run. As the exchange on a bill is the difference in the relative value of money at different places, this reasoning would have some plausibility if applied to a bill of exchange payable in a country where the business and the money market are stable, and their condition at a future day could be calculated on with some certainty. But here the changes and fluctuations in the money market and in exchange are frequent, and their extent uncertain. The more distant the time, the greater the uncertainty. And as the hazard is increased by postponing the day of payment, an increase of the premium adequate to the additional risk, is naturally and properly demanded. These are matters, moreover, that have to be regulated by the current value of the various description of bills at the time they are brought into market, and are properly left to the discretion of the parties concerned in the transaction.

Banks may buy bills of exchange for less or more, proportioned to the time they have to run, and the risk to be incurred by the fluctuation of the money market, without being guilty of usury.

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PILCHER, AS'EE. vs THE BANKS, &c.

But it is alledged that bills of exchange were purchased by the Banks with an understanding that they were to be paid when due, at the Banks, and not at the place where they were made payable, and that other bills were to be purchased, and the proceeds applied to the payment of the first, a premium by way of exchange, to be taken on all of them. Such an arrangement, had it been made, would have been a mere contrivance to evade the statute, and clearly usurious. But it is denied positively, and no proof is adduced in support of the charge. Upon a careful examination of the evidence, we are of opinion, that the bills were all purchased by the Banks, in the usual course of business, in good faith, and that the dealings between the parties were not tainted with usury.

Some of the bills purchased by the Banks not having been paid at New Orleans, where they were made payable, the liability of the parties was decided by the Chancellor to be, not the amount of the bills, but the amount paid for them by the Banks, with interest on that amount, thereby imposing on the Banks the loss of the exchange charged and received by them. The propriety of that decision is now to be considered.

Holders of bills of exchange which have been dishonored, may receive the amount of the bill and interest, and in some cases the expenses incident to the dishonor, (*Smith's Mer. Law*, 215; *Chitty on Bills*, 419,) which according to the mercantile law of Europe, includes interest, costs of protest and premium, and re-exchange paid, (3 *Kent's Com.* 316)

The general rule is, that the holder may recover the sum for which the bill is payable, with interest, and in certain cases, such expenses as may have been occasioned by its having been dishonored. (*Smith's Mercantile Law, side page* 215; *Chitty on Bills*, 419.) The engagement of the drawer of every bill is, that it shall be paid at the time and place designated, and if it be not, the holder is entitled to indemnity for the loss arising from this breach of contract. The General Law Merchant of Europe authorizes the holder of a protested bill, immediately to redraw from the place where the bill was payable on the drawer, in order to reimburse himself for the principle of the bill protested, the contingent expenses attending it, and the re-exchange which he pays. His indemnity requires him to draw for such an amount as will make good the face of the bill, together with interest, and the necessary charges and expenses, and the current rate of exchange, where the bill was payable on the place where it was negotiated. It is not necessary to fix

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the liability of the parties, that he should draw a bill for this purpose; their liability being the same as if it had been actually done: (3 *Kent's Com.*, 116.) The endorser, it is true, when sued by the endorsee, may inquire into the actual consideration between themselves, and is only responsible to the extent of that consideration, whatever it may be. But as it regards the other parties to the bill, they are liable to the holder for its full amount. No reason is perceived why this rule should be varied when applied to the Banks. A different rule might, as suggested by the Chancellor, have a tendency to suppress the sale of fictitious bills. But it might, on the other hand, lead to a breach of good faith, and a violation of those contracts where punctuality is of vital consequence to the commercial business of the country. Let it be decided that a bill held by the Banks, and made payable at a distant point, upon the purchase of which exchange has been deducted, can be discharged at home by the payment of a sum less than it calls for, and a strong temptation to the violation of contracts is at once presented, and a premium in effect offered to the practice of dishonesty. If a Bank or an individual were to purchase a fictitious bill, knowing that such was its character; that it was made merely for the purpose of borrowing money, and would be returned unpaid, discounting exchange, as well as interest thereon, then it is true the purchase could not be regarded as having been made in good faith, but would be considered as usurious, and the purchaser would not be entitled to the full amount of the bill. There is, however, no evidence that such was the fact in relation to these bills.

As between endorser and endorsee, the freal consideration may be inquired into, and that be a measure of recovery in case of dishonor; but the other parties to the bill are liable for its full amount. Banks, as holders, have the same right as an individual.

With a view to the advancement of commercial intercourse, a bill of exchange should be taken according to its natural tenor and effect, as appearing on the face of it, without requiring the purchaser to institute an inquiry into the true nature of its origin, or the object of the parties in making it. No unnecessary obstacle should be placed in the way of the purchase of bills of exchange by the Banks. The exercise of this power is necessary to their very existance. The business of the country extending itself as it does, into several States, local Banks,

The interest of commerce requires that bills of exchange should be taken according to the obvious import without requiring an inquiry into the object of the makers.

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TAYLOR & WIFE vs ANDERSON'S EX.

to sustain themselves, must have funds at those points where they are required by commercial operations, otherwise a drain of their specie necessarily occurs, and their usefulness is destroyed, if their existance itself be not jeopardized. To create these funds they must have power to deal in exchange. The payment of a bill at the place designated, is consequently of more importance to them in the general, than the exchange received by them. So important has punctuality in the payment of foreign bills of exchange been regarded, that in this country damages in the place of re-exchange are allowed in nearly all the States, and were at one time in this State, on their being returned protested for non-acceptance or non-payment. We are, therefore, of opinion that the Banks were entitled to the full amount of the bills returned unpaid, and that the decree of the Chancellor requiring the amount that had been received as exchange on them to be refunded, is erroneous.

The decree in relation to the other matters decided being correct, is affirmed on the original errors, but on the cross errors assigned by the Banks, it is reversed, and cause remanded for a decree as herein indicated.

Pilcher, Duncan and Woolley for plaintiff; *Pirtle, Thruston and Guthrie* for defendants.

CHANCERY. *Case* 135.

Taylor and wife *vs* Anderson's Executor.

ERROR TO THE GARRARD CIRCUIT.

Husband and wife. Settlement upon the wife.

September 23. JUDGE SIMPSON delivered the opinion of the Court.

It is the right of the wife exclusively to have a settlement out of her property, and to be enforced at her instance, whether she occupy the attitude of complainant or def't.

THE wife, in equity, is entitled to a settlement out of her property. This, however, is the exclusive right of the wife, recognized and sustained by the Chancellor for her benefit, and usually enforced at her instance, whether she occupies the attitude of complainant or defendant, seeking the aid of the Court for this purpose.

It is competent, however, for the wife to agree that the fund shall be paid over to her husband. The Court will,

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it is true, under certain circumstances, require a settlement to be made by the husband, notwithstanding her consent to the contrary: (2 *Story's Equity*, 644.)

In this case the husband and wife have united in a bill seeking the aid of the Court to compel the defendant as executor, to pay over to the husband a legacy in his hands, to which the wife is entitled. The executor alone demands a settlement for the wife out of the estate in his hands. She does not ask it, but is solicitous that it should be decreed to her husband. She married, it is true, in opposition to the wishes of her friends, but her husband is proved to be industrious, frugal and unexceptionable in his habits and moral character. He treats his wife with kindness and affection, and no reason exists why the Court, in opposition to her wishes, should insist upon a settlement, except that the husband has very little property of his own.

As the husband, however, is not involved in debt, as he is industrious and economical in his habits, and careful and prudent in the management of his property, living with his wife in harmony, who confides in him, and joins in his application for the payment of this fund to him, we are of opinion that the Chancellor should not require the fund to be settled upon the wife, but should decree its payment to the husband, adopting the precautionary measure of ascertaining by the examination of the wife in open Court, whether or not she waives a settlement and consents that the money shall be paid over to her husband. And if the wife shall not have attained the age of twenty one, retaining the cause until that time arrives, so that she may be of full age when such examination is made and consent given.

The Court below having appointed the executor trustee, and authorized him to retain the legacy for the use of the wife, and having dismissed the complainants' bill with costs, the decree is reversed and cause remanded for further proceedings and decree as herein indicated.

G. R. McKee for plaintiffs; *Bradley* for defendant.

seeking the aid of the Chancellor; but the wife may agree that the fund shall be paid to the husband, tho' there are exceptions to this rule: (See 2 *Story's Eq.* 644.)

When the husband and wife unite in a bill for the wife's property, asking that it be paid to the husband, and it appear that he is industrious, economical, careful and prudent in the management of his property, and living in harmony with the wife, the Chancellor should not require the property to be settled on the wife, but upon the wife being of full age, being examined and consenting in open Court, decree its payment to the husband.

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CHANCERY.

Case 136.

Clay *vs* Scott, &c.

ERROR TO THE BOURBON CIRCUIT.

Priority of liens of attaching creditors. Sheriffs. Service of process.

September 24.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Where several attachments of creditors against the same fund come in succession to the hands of the same officer or his deputies, it is the duty of the officer to execute them in the order in which they were delivered, tho' received by different deputies; and though the process be not in fact executed according to that order, the Chancellor having possession of the funds will distribute it according to the rule which should have governed the officer in its execution.

THE rule stated in the case of *Nutter* vs *Connell*, (3 *B. Monroe*, 203,) that between attaching creditors the first levy gives the prior lien, has not been adhered to in subsequent cases. In *Kennon* vs *Ficklin*, (6 *B. Monroe*, 414,) the principle is asserted, and as we think, established upon sound and sufficient reasons, that when several attachments against the same fund, come in succession to the hands of the same officer or of his deputies, the law makes it the duty of the officer to execute them in the order in which they have been received; and that although when the process comes to the hands of different deputies, this order of service may happen to be reversed without fault, the Chancellor having the fund in his hands under all of the attachments, will distribute it according to the rule which should have governed the execution of the process. It is true that there may be no actual lien in the particular case until the levy of the attachment or service of the subpœna in that case. But every party resorting to this remedy has a right to rely on the impartiality and diligence of the officer, and upon his performance of his duty in serving the process in the order in which it comes to his hands. Every party has a right to the observance of this rule, whether the office of Sheriff be carried on by one or by several agents. And we are satisfied that the end of justice and the purity of its instruments and administration, are better secured by stopping the individual struggle for precedence when the claims of the contending parties are committed to the officers of the law, than if these officers were subjected to the various incentives which private interest might address, to induce a departure from duty.

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Without entering into any further discussion of the subject, we feel bound, for the reasons given in the case of *Kennon* vs *Ficklin, &c.*, to adhere to the rule laid down in that case; and as under that rule H. Clay, senior, whose process, (together with that in one other case,) came first to the hands of the Sheriff of Fayette county, (in which all the subpœnas were served on the guarnishee, Hughes,) was entitled to be preferred to all of those parties whose process, though coming afterwards to the Sheriff's hands, was served before or at the same time with his, it follows that in postponing his claim so as to deprive it in fact of any participation in the fund, the decree is erroneous to his prejudice. We perceive in the decree no other error but in the violation of the true order of precedence, and the writ of error being prosecuted by H. Clay, senior, alone, it is not deemed necessary, in reversing the decree, to disturb it further than is necessary to secure to said Clay the precedence to which he is entitled in the distribution of the fund. This may be done on the return of the cause by a direct order upon the party or parties who have actually received a portion of the fund, which they would not have received if the claim of Clay had been allowed the precedence to which according to the principles of this opinion it was entitled. But as Clay (with one other party,) was entitled to such precedence as would have certainly secured the whole of his claim, he should not now be subjected to the loss of any part of it. And, therefore, if under such an order as is above indicated, his claim should not be satisfied, he will be entitled to a like order or decree against the parties who were, by the decree, allowed the precedence and have received the money to which he was entitled, and these parties should have a decree over against others who have received what they are not entitled to.

Under this disposition of the case the cross errors of B. Scott are, as we understand, withdrawn. But they are, in effect, disposed of in saying that there is no other error in the decree except in the order of precedence in distributing the fund. With regard to the claim of E. Dudley, whose process came to the hands of the Sheriff

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RAILROAD COMPANY vs BRIDGES.

of Fayette at the same time with that of H. Clay, senr., we have had some difficulty in determining whether it should not receive the benefit of the reversal on Clay's writ of error.

But as, notwithstanding the consolidation of the various attachment suits, each claimant is in fact, a separate suitor, so far as regards the prosecution of his own claim, we are inclined to the opinion that Dudley, having neither prosecuted a writ of error nor complained in any manner, of the postponement of his claim, should be understood as being content to abide by the decree.

Wherefore, the decree is reversed in favor of H. Clay alone, and the cause is remanded for further decree and proceedings between him and the other parties, as above indicated.

B. & A. Monroe, Smith and Robertson for plaintiff; *Pindell* for defendants.

CHANCERY.

Lexington and Ohio Railroad Company *vs* Bridges.

Case 137.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Trusts. Limitation. Mistakes. Lapse of time.

September 24.

JUDGE SIMPSON delivered the opinion of the Court.—Chief Justice Marshall did not sit in this case.

Case stated in the bill.

BRIDGES having an unsatisfied judgment against the Railroad Company, upon which an execution had been returned no property, brought this suit in Chancery, to obtain satisfaction of his judgment, making various individuals defendants, alledging that some of them were indebted to the company on account of the reception of illegal dividends, others on account of stock subscribed, and that others had acted as Directors and Managers of the affairs of the company, and by declaring a distribution of the profits, when no profits existed, had by their illegal management of a fund set apart by the charter for the payment of the debts, of which they had the control,

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rendered themselves individually liable to the creditors of the company.

The individuals who acted as Directors at the time the dividends were made, rely in their defence on the following grounds: First, that there were nett profits to divide, and consequently the declaration of the dividends was legal, and authorized by the charter.

The defence relied upon in the answer.

Secondly, if there were no profits to divide among the stockholders, that in declaring the dividends they acted in good faith, under a mistaken conception it may be of what constituted profits, and without a full knowledge of the actual state of the affairs of the company, having been mislead by an incorrect exposition of its condition presented by the officer regularly appointed and authorized under the charter to keep its accounts, but without any wrongful intention on their part, and that therefore they are not individually responsible.

In the third place, they plead and rely upon the statute of limitations.

Lastly, they aver that other suits had been brought by the company's creditors, previous to the institution of this one, for the recovery of various demands, exceeding the whole amount of the dividends in controversy, and that the suits so brought will exhaust the whole fund, and leave nothing for the complainant.

This case presents substantially the same facts that were contained in the case of *Gratz* vs *Redd*, (4 *B. Monroe*, 178.) The Court in that case decided that there were no nett profits at the time the dividends were made. For the reasons there assigned, which it is now unnecessary to recapitulate, we entertain the same opinion. This point in the defence must therefore be regarded as untenable, and not open for further debate or discussion.

The liability of the Directors to the creditors of the company, on account of having misapplied this fund, if not expressly adjudged, was intimated in that opinion. The order directing the payment of these dividends out of the trust fund, was deemed illegal on the part of the Directors who concurred in the act, and Gratz, one of the Directory who concurred, being also a stockholder, and having received the money, was held accountable for

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RAILROAD COMPANY vs BRIDGES.

the dividends in his hands so illegally paid over. We are not of opinion that in directing the payment of these dividends, there was any thing fraudulent on the part of the Directory. They no doubt believed that they were acting legally and properly. They supposed that profits existed, when in reality there were none. If they are to be held individually liable on account of this mistake, it must be on the ground, that if it were an error of judgment, by accepting the office they professed to be in the possession of the skill and qualifications necessary for a faithful discharge of all its duties, and are therefore not exonerated when the injurious act results from the absence of such qualifications, or if it were a mistake of fact, that in accepting the position they occupied, they assumed the discharge of certain duties to the company and to those persons dealing with it, the faithful performance of which required the exercise on their part of unremitting vigilance in relation to the condition of the matters intrusted to their control, as well as a reasonable and prudent discretion as to the manner in which they were managed, and that they failed to use as much vigilance on the occasion as the responsibility of their position imposed on them. We are satisfied, however, that if they were guilty of negligence to any extent, it is not of that gross and palpable character that would render their conduct so reprehensible as to subject them to the imputation of a personal or even a legal fraud.

Assuming for the present, without however deciding the point, that they might, by the exercise of a proper vigilance, have ascertained the fact to be as it actually existed, that there was nothing properly subject to division, and that their failure in this respect imposes on them a personal liability for the fund so illegally disposed of, we are next to inquire whether the statute of limitations has any application in a case of this kind, so as to discharge them from this liability.

In cases of direct, express and continuing trusts of a purely equitable nature, the Chancellor does

It is contended that the statute can have no operation in this case, for various reasons. In the first place, it is argued that the Directory were trustees, holding and managing the fund misapplied for the benefit of the creditors, and that in cases of trust, the statute cannot be relied

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upon. It is true, that in cases of direct, express and continuing trusts of a purely equitable nature, the statute of limitations is not applied by the Chancellor. But where the trust is not strictly of this character, where it is limited in its duration, or where the party seeking redress has a legal remedy, and a Court of law has concurrent jurisdiction with a Court of equity, the rule does not apply; but the statute is permitted to have its operation whether the suit is brought at law or in chancery. It may be that for the injury here complained of, if the Directors were personally liable, a creditor could have maintained his action at law against them. He could bring his action at law against the company for his debt—it was a legal demand. If the persons entrusted with the funds of the company for the payment of debts misappropriated those funds, and he was injured by the act, why should he not have a right to an action on the case against them for the injury sustained by their illegal conduct? In the case of *Rowe* vs *Williams*, decided at the fall term, 1846, (*ante* 202,) it was held by this Court, that the Sheriff was liable in an action on the case, to the security in an injunction bond, for the injury he had sustained by being rendered liable for the debt, by the misconduct of the Sheriff, in the management of the execution against the principal debtor. That case was decided upon the principle that the plaintiff had a direct interest in the management of the execution. That the breach of duty on the part of the Sheriff, whereby this interest was injuriously affected, was an injury to a legal right, by the violation of a legal duty. The same reason would seem to apply in this case. The creditors had a direct interest in the management of this fund. Its proper management was a legal duty. The complainant had a legal right to the demand sued for, and any injury which he sustained by a breach of duty on the part of the Directors, was actually an injury to a legal right by the violation of a legal duty.

not apply the statute of limitations; but where the trust is not strictly of that character, and where the party seeking redress has a legal remedy, and a Court of law concurrent jurisdiction, the rule does not apply; the statute will be applied in a Court of chancery as in a Court of law.

Might not a creditor of an incorporated company maintain a suit at law against the trustees of the company for mismanagement in improperly declaring dividends and paying out the funds of the company to the stockholders when there was in fact no profits to divide?—QR.

But whether a creditor could or not maintain an action on the case against the Directors, for a breach of duty operating to his prejudice, it is entirely certain that the trust imposed on them by their office, was not a continu-

The trust confided to the trustees of an incorporated company, who were only in office for a

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RAILROAD COMPANY vs BRIDGES.

limited time, was not a continuing trust, but terminated with their term of office, though they were again eligible & actually re-appointed, the latter appointment was also temporary, and therefore not such a continuing trust as withdraws it from the operation of the statute of limitation.

ing and subsisting one, but one that terminated with the expiration of the period for which they were chosen, and that the tenure of their office being limited, so was the trust that it devolved upon them. By the provisions of the charter, the Directors are to be elected annually. The duration of the trust that they undertake is limited in its nature. They remain in office but a single year. After they go out of office they cease to be trustees. Being no longer trustees there is no continuing trust, either as it respects creditors or stockholders. Should they be re-elected and remain in office, it will be the commencement of a new trust, and not a continuation of the old one. They will hold the office alone by their new appointment, which both vests the power and creates the trust. It is, therefore, perfectly apparent that this trust is a limited and not a continuing trust, and therefore, not such a trust as is withdrawn from the operation of the statute of limitations.

In the case of the *Bank of the United States* vs *Dallam, &c.* (4 *Dana*, 574,) it was decided that the statute of limitations applies to only such actions of debt as are founded on contracts in fact, and not to such obligations as are imposed either expressly or constructively, by mere law. On the strength of that decision it is contended that the obligation in this case on the Directors, was imposed by the charter; that if a suit at law had been brought against them they could not have relied upon the statute of limitations, and having been sued in chancery they should not be permitted to avail themselves of it. That decision was made upon the particular phraseology of the statute of limitations, which by its language, is made to apply only to such actions of debt as are "grounded upon any lending or contract without specialty." By the statute which was the foundation of the suit in that case, it was provided that the estate of every shareholder should be liable for the payment of all demands contracted by the corporation, upon the failure of the incorporate funds to discharge the same. The statute imposed a direct liability, to enforce which at law, an action of debt was the appropriate remedy.

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RAILROAD COMPANY vs BRIDGES.

The statute incorporating the Lexington and Ohio Railroad Company imposes no personal liability upon the Directors for the payment of the debts of the company. If any arises, it must be the result of their wrongful acts, when case would be the appropriate remedy, to which limitation might be plead.

In this case the statute imposes no personal liability upon the Directors for the payment of the debts of the company. Their liability, if any exist, results from their own wrongful act, and the appropriate remedy at law against them, would be, if they are liable at law, not debt, which could not be maintained, but an action on the case, against which the statute of limitations can always be relied upon, so that there is an essential difference, both as it regards the foundation of the liability and the appropriate action at law, between that case and this one.

It is, however, contended that the statute of limitations has no application where a fraud has been perpetrated or a mistake exists, until a discovery is made of the commission of the one or the existance of the other. The exemption from the operation of the statute, has sometimes been limited to cases of fraud only. But according to the decisions of this Court in *Crane* vs *Prather*, (4 *J. J. Marshall*, 75,) and *Frankfort Bank* vs *Markley*, (1 *Dana*, 373,) the statute does not apply where either fraud or mistake exists, until their existance is discovered. As the Directors were not guilty of fraud, but committed a mistake in distributing the fund, what effect is thereby produced upon the application of the statute in their favor? When the existance of a mistake is said to relieve the remedy for the redress of the injury occasioned by the mistake from the effect of the statute, what kind of a mistake is contemplated? Is it not a mistake made by the complaining party, under which he labors, which has worked him an injury, and to redress which he cannot be said to have a cause of action until its existance is discovered?

To enable a complaining party to avoid the effect of the statute of limitation on the ground of failure to discover the mistake, which is made the grounds of recovery, he must show an exercise of a proper degree of vigilance in the pursuit of his right.

The mistake relied upon in this instance is of a different character. If it can be regarded as having the effect ascribed to it, still the party who seeks to shelter himself from the operation of the statute under such an excuse, must show that by the exercise of that vigilance, which the law requires on the part of every creditor, he could not have made an earlier discovery of the matter relied upon. Now it is apparent that by the proceedings on the part of the company in the fall of the year 1837, the report

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RAILROAD COMPANY vs. BRIDGES.

of the committee on this subject, the reference to arbitrators and their award made thereon, as much in relation to these dividends and the action of the Directory in ordering their distribution was ascertained and made publicly known, as has hitherto been made known or exhibited, all of which could have been known by any creditor who would have availed himself of the ordinary means of acquiring information on such subjects.

The statute of limitations is founded upon the soundest principles and the wisest policy. It should be permitted to have its effect in all cases, where its operation would not work evident injustice. There is a very cogent reason in favor of its operation in this case.

The Directors of the Lexington & Ohio Railroad Company could not be made responsible beyond the amount of the funds which was wrongfully distributed to the stockholders, and are entitled to have that am't. refunded if made liable.

It is very evident that the liability of the Directors cannot, if they be liable at all, exceed the amount of the fund improvidently distributed by them, and that if they should have to pay the amount of that fund to the creditors, they would in equity, be entitled to reclaim it for their indemnity, from the stockholders who had received it. Now the right of the stockholders to rely upon the statute of limitations against any suit brought to reclaim these dividends is unquestionable. Indeed it may well be doubted whether they would be liable to any proceeding for this purpose, on the part of the Directors, except an action of assumpsit for money had and received, and whether proceeded against by the creditors or the Directors, it is perfectly evident that they might avail themselves of the limitation to defeat a recovery. Great injustice would then be done the Directors, if the statute of limitations would not operate in their favor when sued for this fund, but would operate against them when a suit was brought by them to have it refunded. The hardship and injustice appear more manifest when it is recollected that their liability, if it exists at all, arises from a mere error, and not from any wilful or fraudulent misconduct.

The Directors of said company may rely upon the lapse of time in a proceeding in chancery by a judgment creditor of the company to render

We have, therefore, come to the conclusion that the Directors have a right to rely upon the statute of limitations in this case, and that its effect is to discharge them from all personal liability to the complainant, more than five years having elapsed from the time the action of the Directors in relation to these dividends was publicly

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known before he instituted this proceeding against them. The doctrine of this decision on this point, we think is fully sustained by the principles of the case of *Kane* vs *Bloodgood et al.* (7 *Johnson's Chy. Rep.* 89,) and the cases there referred to.

them personally responsible on account of an improper distribution of the money of the Co. as dividends, when there was in fact no profit to divide. See *Kane* vs *Bloodgood*, (7 *Johnson's Chy. Rep.* 89.)

But as the decree of the Chancellor is against some of the stockholders for the dividends received by them, as well as against those persons who acted as Directors when such dividends were declared, and as other creditors are alledged to have a prior lien on this fund in the hands of the stockholders, by having brought suits to reach it, before the commencement of this suit by the complainant, and such creditors having been made defendants, and the demand of the Northern Bank, the President, Directors & Co. of said Bank being one of the said creditors, having been by the decree postponed to the complainant's demand, we are next led to enquire into the propriety of the action of the Chancellor in refusing to set aside the order taking the complainant's amended bill for confessed, and to permit the answers of the defendants to be filed. On the 15th of October, 1844, the amended bill was filed making the complainants in those prior suits defendants. Process on this amended bill was executed in November following. The cause was set for trial on the 13th of December of the same year; was heard on the 17th, and the decree rendered on the 20th of the same month. On the 3d day of January, 1845, during the same term, the Northern Bank and other defendants, made a motion to file answers to the amended bill, which answers were then offered. They filed in support of their motion, the affidavit of M. C. Johnson, their counsel. He states in his affidavit that he was employed by the defendants, in the month of November, immediately after the service of process upon them, to file their answer. That he forthwith sent for a copy of the amended bill, which was transmitted to him. That he was compelled to go to Cincinnati on business, and on his return had to attend the Federal Court at Frankfort, and the Fayette Circuit Court having had a chancery and criminal term, which had been continued from time to time, until the 23d of December, he had been almost

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RAILROAD COMPANY vs BRIDGES.

constantly engaged in professional business. That being in the habit of attending to chancery business in the Circuit Court, it did not occur to him that immediate attention to this case was indispensably necessary, at least until after the expiration of the Fayette term, before which time arrived he was informed that the decree in question had been rendered against his clients. Now when it is considered that the defendants were prompt in their application to counsel, who having been closely occupied by his professional engagements, from the time he was spoken to, until the decree was rendered against his clients, was prevented from attending to the preparation of their answer; and when it is, moreover, considered that a very short period of time had elapsed between the service of the process on the amended bill and the hearing of the cause, and that the answers were tendered immediately afterwards, during the same term, it seems to us that it would not have been an unreasonable indulgence to have sustained the motion, and allowed the answers to be filed. And inasmuch as the decree has to be reversed, and as it may be material so far as the Directors are concerned, that the funds in the hands of the stockholders should be appropriated to the payment of debts according to their priorities, and as the decree in this case is against said fund in the hands of three of the stockholders, the defendants, on the return of the cause to the Court below, are allowed to file their answers, so that it may appear whether any other creditor has proceeded against this fund before the complainant, so as to have acquired a previous lien thereon.

It was error to decree against a stockholder of the Lexington & Ohio Railroad Company, when it was alledged that his stock had been forfeited to the company. If the stock was forfeited he was absolved from further liability to the company or its creditors.

The decree is also against Robert Wickliffe, and the question occurs, whether or not there is any error in it, so far as he is concerned. The complainant having filed an amended bill during the progress of the cause, requiring the President and Directors of the Railroad Company to answer and set forth the stockholders, if any, who had subscribed for stock and had failed to pay the amount subscribed; the President of the company in pursuance of that call upon him, filed an answer specifying various individuals who had subscribed for stock, and having failed to pay the same, it had been forfeited for such

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failure. The defendant, Wickliffe, was one of the persons named. Thereupon the complainant filed an amended bill, alledging that it appeared by the answer of the Railroad Company filed in this cause, that various persons were indebted to said company for and on account of stock subscribed, among whom was the defendant, Wickliffe; that he still owed on that account the sum of $20,000, and prayed a decree against said defendants for the payment of his judgment at law. Wickliffe having failed to answer, the amended bill was taken for confessed, and a decree rendered against him for the full amount of the complainant's demand. As the amended bill making Wickliffe a party, referred to and was based upon the answer of the Railroad Company, and as that answer stated that Wickliffe's stock had been forfeited, we are of opinion that it was improper to render a decree against him, without having first ascertained that his stock had not been regularly forfeited under the charter, so as to absolve him from all liability on account thereof, and that he was still responsible for it to the company or its creditors, and that in this respect the decree is erroneous.

Wherefore, the decree of the Chancellor is reversed, and cause remanded for further proceedings in conformity with this opinion.

Robinson & Johnson and Robertson and Woolley for plaintiffs; *Guthrie and Ballard* for defendant.

Pleak *vs* Chambers.

EJECTMENT.

ERROR TO THE CLARKE CIRCUIT.

Case 138.

New trials. Evidence. Landlord and Tenant. Instructions. Champerty. Partition.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.—Judge Simpson did not sit in this case.

September 25.

THIS case in ejectment was formerly before this Court, and the opinion reported in 6th Dana, 426, is referred to for a general statement of the facts and principles involved. Chambers, the lessor of the plaintiff, having succeeded in the last trial, it is insisted that the Circuit

A reference to 6 Dana, 426, for the facts of the case.

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PLEAK vs CHAMBERS.

Court should have granted this motion for a new trial, on the ground that the verdict was against law and evidence; and it is also alledged that the instructions given to the jury are erroneous. We are of opinion that none of these grounds are available for the reversal of the judgment.

Where the evidence is contradictory upon the point involved, it is for the jury to decide, and if the instructions of the Court have not been misleading, the verdict should not be disturbed.

1. With regard to the evidence, we need only say, that if the instructions were not misleading, the testimony was of a character to preclude the granting of a new trial by this Court, in opposition to the opinion of the Circuit Judge, who presided at the trial. There was contradictory evidence upon the material points involved, upon which it was the province of the jury to decide.

2. The former opinion above referred to, decides that if the defendant or those under whom he claims, acquired the title of Warner, who had a judgment in ejectment, after the expiration of the demise in the declaration, and before possession had been taken under the judgment, they were not thereby absolved from their allegiance due to the title of Gore, under which they had obtained possession as tenants or *quasi* tenants. And it was also intimated, though not decided, because not then necessary to be decided, that the acquisition of the title of Warner was alike ineffectual, though made before the expiration of the demise, if when made there was an injunction pending against the execution of the judgment. Each of these positions is, in our opinion, and for the reasons given in the former opinion, correct, and there is therefore no error in the two instructions given on the late trial, in which it is asserted that the purchases made under either state of case, could not bar the action.

The third instruction, referring to the record of an action of trespass of Pleak against Chambers, and another, which was in evidence before the jury, and in which Chambers had pleaded that he had the right of entry into the land, &c. at the time of the alledged trespass, and the other defendant pleaded a license from Chambers, instructed the jury that if the land in contest in this suit and in the action of trespass was the same, the verdict and judgment for Chambers, &c., in the action of trespass, was strong and weighty evidence that at the

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time of the supposed trespass for which the action was brought, the right of entry in said land was in Chambers.

The issue in the action of trespass having been joined upon the particular point of the right of entry in the land at the time of the alledged trespass, the verdict and judgment for the defendants were no doubt admissible between the same parties to prove the same point, whenever in another case respecting the same land it should become material: (1 *Starkie on Evidence*, 201; *and note n. same*, 204.) There was however no point made as to the admissibility of the record. Nor do we suppose any serious objection can be made to the effect given to it by the instruction, as being strong and weighty evidence of the particular fact involved in the issue. And as the case, upon the evidence, turned mainly upon the character of the possession, whether it was adverse to Gore's title, and had been adverse for such a length of time as to constitute a bar, the fact which the record of the trespass case tended to prove, that only a few months before the commencement of the action of ejectment and the date of the demise, the lessor had the right of entry, cannot be deemed immaterial in the enquiry whether he had that right at the date of the demise and the commencement of the ejectment. The instruction does not say that the judgment in trespass is strong evidence of the plaintiff's right of recovery in this action, but only that it was strong evidence of the particular fact which was established by the verdict, leaving the jury to determine according to their own judgment, the efficacy of that particular fact to prove the right of entry as it was in issue in this case; and at most, throwing upon the defendant the burthen of showing that the right of entry existing at the time referred to in the issue in trespass, had been tolled or otherwise lost before the date of the demise. We are not prepared to say that in either aspect the instruction was erroneous: *Parker* vs *Standish*, (3 *Pickering's Rep.* 288;) *Preston* vs *Harvey*, (2 *Hen. & Mun.* 63.)

The record of an issue formed and decided in an action of trespass, is admissible in evidence between the same parties in the trial of an issue involving the same question: 1 *Starkie*, 201; *note n. same*, 204.

The fourth instruction is based upon and asserts the principle that if a party entering under one title afterwards purchase in another adverse claims, and thenceforward holds under all the claims, his possession is not

If a party entering under one title afterwards purchase an adverse claim, his possession is not

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PLEAK
vs
CHAMBERS.

to be regarded as adverse to the title under which he entered, does not bar it; and those receiving the possession from the person who first entered are in the same condition.

to be regarded as adverse to the title under which he entered, and does not bar it. And as in this case there was no question that the possession which had been transmitted to the defendant was originally acquired by permission of Gore's agent and in the character of tenant or *quasi* tenant to Gore, the plaintiff, if he held Gore's title, had undoubtedly a right to recover the possession acquired and held under that title, notwithstanding the union of other titles with it in the hands of the tenant. This we understand to be the entire scope of the instruction, and we perceive no substantial objection to it.

These four instructions having been given on motion of the plaintiff, the defendant moved for an instruction to the effect that if one Glover, (from whom the defendant derived the possession,) and those claiming under him, had been in possession for more than twenty years before the institution of this suit, and by open and distinct declarations to Gore's agent and others, renounced all claim under Gore's title, and distinctly and publicly announced to said agent and others, that he held said land under Warner's patent and adversely to Gore's patent, more than twenty years before this suit was instituted, and Glover, and those claiming under him, have had such adverse possession ever since, the law is for the defendant, &c. This instruction was given, but the Court added as a modification, "but to constitute an adverse holding on the part of Glover, &c., they must not have claimed under Gore's title at all, but in opposition to it during the whole period of twenty years; and if Glover entered under Reynolds and Reynolds under Gore, and Glover and those claiming under him have continued to hold under Gore's claim, then although they may have purchased other and adverse claims, they cannot rely upon their possession as a successful bar to the plaintiff's action; and if the land now in contest and the land in contest in the trespass case is the same land, the judgment in said action of trespass is weighty evidence, that at the time of the entry for which said action of trespass was brought, the defendant had not such adverse possession." As this addition to the instruction asked for by the defendant, is in substance

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only a re-assertion of the third and fourth instructions given for the plaintiff, with such verbal changes as made them applicable to the subject of the defendants instruction, no further remarks are requisite in support of the position asserted. But it is contended that the defendant's instruction was, in itself correct, and that the addition made by the Court, even if abstractly correct amounted to a denial of the defendant's instruction as asked, and being gratuitous on the part of the Court, was calculated to give undue importance to the circumstances thus brought forward, and especially to the judgment in the action of trespass.

A sufficient answer to this objection is, that the defendant's instruction was itself, not entirely unambiguous, and that if given without explanation, it might have misled the jury into the belief that an open renunciation of Gore's title and assertion of title under Warner, made by Glover more than twenty years before the commencement of this suit, and followed by continued possession ever since, was a bar, irrespective of other circumstances. The addition made by the Court, only corrected this tendency and brought into view other circumstances which should also be taken into consideration as qualifying the effect of the particular facts relied on by the defendant. With regard to the judgment in the trespass case, our doubt has been whether it was not conclusive as to the right of entry then in issue, we have no doubt as to its being weighty evidence to prove that it then existed and had not then been barred by twenty years adverse possession. Nor do we doubt that this circumstance was entitled to consideration in determining the character of the possession as involved in this case.

The Court may properly qualify any instruction asked by a party (to prevent any misleading effect it may be calculated to have with the jury) by the statement of other considerations, which the jury should weigh.

It is scarcely necessary to say that a Judge appealed to for an instruction as to the effect of particular facts, has the right to add such explanation as may be requisite to prevent misconception on the part of the jury, and to present the question involved in the instruction fairly before them. We think nothing more was done in the addition or modification made to the defendant's instruction in this case.

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PLEAK vs CHAMBERS.

It is not necessary that those who may be in possession of land descended to heirs, tho' claiming under them, should be parties to a suit for partition amongst the heirs, to make the conveyances effectual to pass the title amongst the heirs. Nor does the champerty law have any application to suits for division between heirs, nor to conveyances where there was not an adverse possession before suit brought.

It is further contended that the deed made by a commissioner in a suit for partition between Gore's heirs, and under which the lessor of the plaintiff claims title to the land now in contest, is entitled to no effect, and that the plaintiff claiming under one of Gore's heirs, could therefore, recover only an undivided interest in this land, because the occupants of the land were not parties to the suit, and because their possession having been adverse when the deed was made, it was void under the act against champerty. As neither of these objections appears to have been made in any form in the Circuit Court, it is obvious that so far as they depend upon matter of fact and evidence, they cannot but be distrustfully regarded in this Court. It is sufficient, therefore, to say that it was not essential to the transfer or release of title between Gore's heirs, that the occupants of the land, though claiming under them, should have been parties to the deeds or to the suit in which they were decreed and made. The legal title might pass under the decree, although the equities subsisting before the commencement of the suit, in persons not made parties, may not have been concluded thereby. And as to the objection on the score of champerty, the record does not present the question for our decision, because, although it might perhaps be assumed that at the date of the commissioners deed, which was only a few days before the commencement of this suit, the possession of the land now in contest was adverse, it certainly cannot be assumed to have been so at the commencement of the suit for partition. On the contrary, it may be assumed on the case as now before us, that the possession was originally taken and held under Gore's title, and that whatever demonstrations of hostility there may afterwards have been, there had not been, at the date of the commissioner's deed, and certainly not at the commencement of the suit for partition, such a continued adverse possession as to relieve the occupant from the estoppel arising from the manner in which the possession was acquired; and we are not satisfied that such hostile demonstrations by a tenant, or even his open renunciation of the relation, while he was still under the estoppel, would prevent the effectual alienation

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of title by the landlord. But this point is not decided. We are satisfied that the deed of partition could not be affected by the assumption of hostility during the pendency of the suit for partition.

Upon the whole case, we perceive no error to the prejudice of the defendant in the action, and the judgment is, therefore, affirmed.

Apperson for plaintiff; *Frenck* for defendant.

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Richardson, &c. *vs* Linney, &c.

CHANCERY.

APPEAL FROM THE CLARKE CIRCUIT.

Case 139.

Guardian and ward. Practice in chancery.

JUDGE BIBCK delivered the opinion of the Court.—Judge SIMPSON did not sit in this case.

September 25.

Case stated in the bill.

ON the 24th February, 1840, Richardson was appointed the statutory guardian of Oliver Perry Linney. On the 22d February a contract had been made between Richardson and Linney, by which the latter sold and transferred to the former, a slave, and also sundry claims and money, and in a word, all his estate, in consideration of $200, to be paid shortly thereafter, and $1,000 when the latter should become of age and confirm the contract.

On the 8th January, 1841, this contract was confirmed, or rather Linney executed a transfer to Richardson of some property in consideration of $1,358, and in same instrument he acknowledged himself to be twenty one years of age, and that a settlement had been that day made between him and his said guardian, and that he had received in full, all the money and property which he was entitled to claim from him.

On the 8th day of January, 1842, Linney filed this bill in chancery against Richardson and his sureties in his guardian bond, and also against Turpin, a former guardian, and his sureties, of whom his last guardian, Richardson was one. He alledges that he was not twenty one years of age till the 4th January, 1842; that Richardson had fraudulently obtained from him a transfer of his es-

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RICHARDSON, &c. vs LINNEY.

tate while an infant, and with a knowledge of the fact of his infancy; that he had paid him a very inadequate consideration, his estate being of the value of three or four thousand dollars. He prays that the transfer to Richardson and the pretended settlement may be set aside and disregarded, and that he and also Turpin, may be compelled to settle up their accounts as guardians, and to pay and deliver to him all the money and property in their hands, to which he may be entitled.

Answer of Turpin and Richardson, and cross bill of the latter against compts. and Turpin.—Makes H. Daniel also a party. Charging champerty.

Turpin, who was a brother-in-law, admits that Linney was not twenty one till the 4th January, 1842; Richardson answers that he had reluctantly consented to become the guardian of complainant, and that he had done it with an assurance from him and Turpin, that he would be of age on the 4th January, 1841. That he had settled with him upon that assurance; that the arrangement was not made with a view to a speculation, and that he was willing, if what he had paid was refunded to him, to rescind the contract made with him. He insists that the complainant was, however, of age at the time he had represented, and if he was not, that he had been guilty of the grossest fraud and imposition. He made his answer a cross bill against the complainant and Turpin, and also made Henry Daniel a defendant, the counsel who had brought the suit, and who, as he alledged, by some champertous contract, was to have the benefit of what might be recovered, or a portion thereof. He prayed that in the event it should turn out that complainant was not of age till 1842, that he might be allowed what he had paid him. He denies all the allegations of fraud; that he had made no attempt and had not improperly or unjustly obtained from complainant a settlement or transfer of his estate.

H. Daniel's answer denying champerty, but claiming by purchase the benefit of the suit.

Daniel denied the champerty alledged, but claimed by purchase from complainant, the benefit of the suit.

Decree of the Circuit Court.

The Court below was of opinion that whether complainant was or not of age in January, 1841, was not important; that in either event, the contract of purchase by the defendant, Richardson, ought to be rescinded and disregarded, and that he should be required to settle his accounts as guardian, in the same manner as if no such contract had been made. A decree was accordingly ren-

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dered and a commissioner appointed to state and report the accounts of both Richardson and Turpin, with directions to allow the former a credit for the money or property advanced the complainant upon the contract of purchase.

From that decree Richardson has appealed to this Court and Daniel has assigned cross errors.

Upon the main question of fact as to the age of the complainant, the testimony is extremely contradictory, so much so that a critical and laborious examination of the great mass of it in the record, has not resulted in a very satisfactory conclusion. Had the parents of the complainant had two sons of his name, the testimony would very satisfactorily show that one was born on the 4th of January, 1820, and the other on the 4th January, 1821.

But without going into a minute examination and analysis of the evidence, it is sufficient to say, that we are inclined to the opinion that the complainant was born on the 4th January, 1821, and consequently was not of age at the time of the settlement and transfer to the defendant, Richardson. But if wrong in this opinion, and it be conceded that he was born on the 4th of January, 1820, and of course was of age at the time of the settlement and transfer, still we think the Court below was right in disregarding them.

Contracts made by guardians with their wards immediately after they become of age, are regarded with suspicion by the Chancellor, and if found to have been made with a view to speculation or upon the appearance of the least unfairness, will be disregarded: (1 *Story's Eq.* 313.)

The original contract was made while complainant was an infant, and in anticipation of the appointment of Richardson as his guardian. It provides in express terms for its ratification when complainant should become of age, and the presumption is, was made in view of a speculation on the part of Richardson. The settlement and attempt to confirm it, were made only three days after complainant became of age, even conceding that he was of age in 1841. It is true the transfer at that time made, does not in terms refer to the previous contract, and it even appears that Richardson paid him more than he had stipulated to pay in the former contract. But even if regarded as an original contract, the objection to it would be equally valid. Contracts made by guardians with their wards immediately after they become of age,

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RICHARDSON, &c. vs LIVNEY.

are always regarded with suspicion by the Chancellor, and if made with a view to a speculation, or upon the appearance of the least unfairness, are always set aside and disregarded. The relation between guardian and ward is considered one of the most important and delicate of trusts. And in the language of Justice Storey, "Courts of equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short, unless under circumstances demonstrating in the highest sense of the terms, full deliberation and *uberrima fides*. For in all such cases the relation is still considered as having an undue influence upon the mind, and as virtually subsisting, especially if all the duties attached to the situation have not ceased, if the accounts between the parties have not been fully settled, and if the estate in some sort still remains under the control of the guardian." (1 *Story's Equity*, 313,) and authorities there cited.

In this case, the contract was in the first instance, in effect between guardian and ward, and in the last, the relation virtually subsisted. The estate of the ward was still in the hands of the guardian, and it was the very settlement and contract complained of, that finally dissolved the relation.

He who comes into Court to ask equity, will be required to do equity.

The decree, we think, is also right in directing a credit to be allowed the defendant, Richardson, for the amount paid or advanced to the complainant. He comes into a Court of equity for relief, and should be required to do equity. It is not alledged, nor does it appear, that he had squandered, injudiciously used or wasted what he had received. Besides, his conduct and representations in regard to his age at the time of the settlement, and also before that time and afterwards, was such as to entitle him to no peculiar favor in the consideration of the Chancellor.

In regard to the numerous errors assigned by the appellants, we need only remark, without noticing them in detail, that none of them are deemed available. Whether the many exceptions to the testimony, bearing upon

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the question of the complainant's age, were or not properly sustained or overruled, it is not important, in view of the principle upon which the case is made to turn, to enquire.

After the complainant had transferred his claim and the benefit of the suit to the defendant, Daniel, he had no right to dismiss or control it. And his statements made after that time as to the matters in contest, were properly excluded as evidence.

Daniel was properly made a defendant to the complainant's bill, and as no objection was made by the appellants to the trial of the cause immediately after filing his answer, it is deemed too late to make the objection here. And more especially as he substituted as his answer to the complainant's bill, his answer to the cross bill of Richardson, which had been in the record for years.

It is not an available error, that the suit was tried at the same term at which the answer was filed, if there was no objection then made.

The cross errors of defendant, Daniel, have already in part been disposed of, and as to the residue, they are not considered available.

Wherefore, the decree upon both the original and cross errors, is affirmed.

Peters and Apperson for appellants; *Daniel* for appellee.

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Goddin *vs* Shipley.

ASSUMPSIT.

APPEAL FROM THE MADISON CIRCUIT.

Case 140.

Law of the contract. Days of grace.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

September 27.

THIS was an action of assumpsit by Shipley, as assignee of Walker & Kennett, against H. Goddin, the payee and first assignor or endorser of a promissory note, signed by A. C. Goddin, payable to H. Goddin, and endorsed by him and by Walker & Kennett. The note is dated "St. Louis, July 16th, 1841," and promises fifteen months after date, to pay to the order of Hugh Goddin, $1,886 95, without defalcation or discount, for value

Case stated.

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GODDIN vs SHIPLEY.

received, negotiable and payable at the office of the St. Louis Perpetual Insurance Company.

By the 6th and 7th sections of an act of the Legislature of Missouri, approved February, 1835, and read in evidence on the trial, it is enacted, sec. 6, that every promissory note for the payment of money expressed on the face thereof to be for value received, negotiable and payable "without defalcation," shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner, as inland bills of exchange. And sec. 7, that the payee and endorsers of every negotiable note payable to them or order, and the holder of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and endorsers of them respectively, in like manner as in case of inland bills of exchange, and not otherwise.

The declaration avers that the note was executed at St. Louis, in the State of Missouri; that on the 19th of October, 1842, it was presented for payment at the office of the St. Louis Perpetual Insurance Company, in the State of Missouri; that it was not paid, &c.; that the defendant had due notice, &c., and that by means thereof and the statute of the State of Missouri, the defendant became liable to pay, &c. The alledged presentation, non-payment, and notice, were proved as averred, the notice having been sent by mail from St. Louis, directed to the defendant at Richmond, Kentucky, the place of his residence. And upon evidence conducing to prove that the note was in fact made at Richmond, Kentucky, and there endorsed by the defendant, he moved the Court to instruct the jury, that if it was so made and endorsed, they should find for him. But this instruction was refused, and on motion of the plaintiff, the jury was instructed, that if they found the St. Louis mentioned in the note as the place of payment, was the city of St. Louis in the State of Missouri, the law of that State governed the rights of the parties, and if the further believed the other evidence in the case, they must find for the plaintiff.

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The propriety of refusing the first and giving the last of these instructions, presents the principal question for our consideration.

A contract referring by its terms to a particular place of performance, is to be construed, and its legal character determined by the law of the place of performance.

The general principle that a contract, referring by its own terms, to a particular place where it is to be performed, is to receive its construction and legal character and effect from the laws of the place thus referred to, is in itself so obviously reasonable, and on the score of authority, so well established as to preclude all discussion of its correctness. Nor is there any room for questioning that the note in this case comes fully up to the description of the notes to which the 6th section of the statute of Missouri relates. Indeed, supposing St. Louis in Missouri, to be the place referred to, it might be assumed that the terms of the note were adopted with the express view of bringing it fully up to the requisition of that section, and to the very end that it might receive its character and operation from that statute. It is then not only in virtue of the general principle above stated, but by the direct intention of the parties, that this note, wherever executed, should be regarded, as in character and effect, an inland bill, if it referred to St. Louis in Missouri; and if it was in truth, made in Kentucky, the circumstance that it was nevertheless, dated "St. Louis" proves the more certainly the intention that it should take its character and effect from the laws of Missouri. According to those laws the note is in effect, an inland bill of exchange, and the rights and liabilities of the parties are to be governed by the law relating to those instruments. It is to be treated as an inland bill of exchange, not only in Missouri, but wherever its character and effect come in question. Then the payee and first endorser being an immediate party to the instrument, must be presumed to have concurred in its terms and in the intention which they indicate, of making it, in effect, an inland bill of exchange, and it should perhaps, be inferred that he intended to become liable as the endorser of an inland bill of exchange. The instrument itself being subject to the mercantile law, it would seem to be a legitimate consequence, that the endorsements made on it, and authorized by that law, should also be governed by

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GODDIN vs SHIPLEY.

Though a bill be drawn in Kentucky, or a note given in Ky., yet if it be dated as at St. Louis, and payable in St. Louis, the law of Missouri, the place of payment determines its legal character.

it. Whether, if the note were actually assigned in Kentucky, for value, and by a citizen of Kentucky, so that there was a complete contract of assignment here, the assignor might be held liable here as the endorser of a bill of exchange, and upon such diligence against the maker of the note as would be sufficient in case of an actual bill of exchange against the acceptor, may however, be considered as a doubtful question, since the assignment would itself, be a new contract, which although in its direct effect of passing the title in the instrument, it should be referred to the law which governs the instrument itself, may not, so far as it creates an implied liability, or contract to pay if the debt is not made out of the maker of the note, be referrable to the same law. The present case, however, does not require a direct decision of this precise question. There is no evidence from which it could be inferred that the note, though the name of the payee may have been put on it in Kentucky, was actually negotiated or sold or transferred in this State, nor until it was delivered to Walker & Kennett, who resided at St. Louis in Missouri. The date and tenor of the note, the fact of the residence of the maker and the first endorsees or assignees at St. Louis, and the fact that the only evidence of the place where it was endorsed, is in the proof that the payee lived in Kentucky and had never been in Missouri, without proof that the note was ever in the hands of any assignee in Kentucky, instead of proving that there was a contract of assignment or endorsement in Kentucky, tends to prove that there was no such contract in Kentucky, but that the note was made and the payee's name endorsed on it for the accommodation of the maker, with a view to its negotiation at St. Louis or in Missouri, and that until so negotiated there, it remained in the hands of the maker. It is, however, immaterial whether the note was endorsed for the accommodation of the maker, or whether it evidenced a real debt to the payee, and was endorsed or assigned by him for value. The mere endorsement of his name upon the note, did not make a contract without delivery or acceptance. There being then no evidence of such a contract in Kentucky, as could have made the law of Ken-

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tucky applicable to the endorsement, as to a contract made in this State, the instruction that if the note was made and endorsed in this State the plaintiff could not recover, was properly overruled.

When the local law of a State does not fix the days of grace which shall be allowed upon negotiable notes, the law merchant fixes it, which is by custom, varying in different places, and the custom should be proved.

Under this view of the law of the case, and there being no contrariety of evidence on any matter involved, the instruction given by the Court as above stated, would not be deemed erroneous, and the judgment would be affirmed as being founded on a verdict which the jury were bound to render as they did, for the plaintiff, were it not for a defect of the proof as to the due presentation of the note. The note was presented three days after the expiration of the time mentioned for payment, and probably on the last day of grace. But the number of days of grace is fixed by the local law and not by the law merchant, which refers it to the law or usage of the place or country where the instrument is payable. And there is no evidence of the law of Missouri on this subject, none at least which would authorize the Court to withdraw the fact from the jury as is done by the instruction which places their verdict upon the single question as to whether the St. Louis mentioned in the note, is St. Louis in Missouri.

Wherefore, for this error alone, the judgment is reversed and the cause remanded for a new trial.

Caperton for appellant; *Turner* for appellee.

Mahan, &c. *vs* Mahan.

CHANCERY.

ERROR TO THE BALLARD CIRCUIT.

Case 141.

Parties. Consideration. Gifts. Specific performance.

JUDGE BRECK delivered the opinion of the Court.

September 27.

PETER MAHAN executed and delivered to his son James C. Mahan, the following writing or writings:

Case stated and the bill.

"*State of Kentucky, Hickman county, Jan.* 13, 1841.

"*To all whom it may concern*, Be it therefore known, that I have this day given unto my son James C. Mahan, two hundred acres of land, lying in township five, range

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MAHAN, &c. vs MAHAN.

two west, to be surveyed out of the southwest of deeded land, and I hereby obligate myself neither to will, deed, nor mortgage said land during my natural life, but consider it his right and property.

Peter Mahan.

TEST,—*John H. Mahan,*
Suton O. Daniel,
John H. Claunch."

"Be it therefore known, that after the decease of myself and wife, Elizabeth Mahan, I give unto the said Jas. C. Mahan, my two black boys, known by the names of Sol and Isaac, but it is expressly understood we retain both the use and right of said negroes during our natural lives. *Peter Mahan.*

ATTEST,—*John H. Mahan,*
Suton O. Daniel,
John H. Claunch."

"Be it further known, that at our decease, myself and wife, Elizabeth H. Mahan, that the said James C. Mahan, is to be considered the sole heir of the residue of all the landed estate I may die in possession of, excluding my other heirs from any claim to the above donations. Given under my hand and seal the day above written.

Peter Mahan, (Seal.)

ATTEST,—*John H. Mahan,*
Suton O. Daniel,
John H. Claunch."

This writing, or these writings, appear to have been all executed at the same time, and on the same paper.

At the same time Peter Mahan and his son James, by a written agreement, formed a partnership in the farming business, by which the former stipulated to give up to the latter the farm on which he lived, the two slaves named in the foregoing writing, and other property, to be under his control and management. Under this agreement, James subsequently carried on the farm and controlled the slaves up to the death of his father, in February, 1842.

This bill was filed by James C. Mahan, alledging that his father had died intestate, leaving three children be-

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sides himself, all of whom, together with the widow, were made defendants.

He sets up the writings aforesaid, and claims under them the two slaves, the two hundred acres of land, and also an additional tract of about two hundred acres, left by his father, of all which he alledges he is in possession by the consent of his mother, who is willing that the land should be conveyed to him with or without reservation of her life estate. He alledges that no deed of conveyance had been made to him by his father, or since his death, by his heirs; that his brother, John H. Mahan, who had administered upon the estate of his father, and who was also made defendant, claimed said slaves, and was threatening to take them and hire them out; that he and the other heirs also contested his right to the land; that the personal estate left by his father was more than sufficient for the payment of all the debts. He prays that the heirs may be decreed to convey the land to him, and that he may be quieted in the possession and enjoyment of the slaves.

The defence set up and answers.

A part of the defendants answered, and resisted the relief sought, upon the ground that the writings relied upon were invalid, and were besides procured by the exercise of undue influence by the complainant over his aged father. The administrator admits the sufficiency of personalty for the payment of the debts.

Decree of the Circuit Court.

The Court below decreed a conveyance from the heirs, of the two hundred acres of land named in the obligation of the deceased, and also of all the other landed estate owned by him at the time of his death; and that the title of the complainant to the two slaves be quieted, and the defendants prohibited from asserting claim or right thereto.

To reverse that decree, the defendants have brought the case to this Court.

The husband of the heir is a necessary party to a bill for the conveyance of land vested in the wife as heir to her father.

It is contended for the plaintiffs in error, that the decree is erroneous: 1st. Because John Claunch, the husband of one of the daughters of Peter Mahan, was not a party. It is recited in the decree that he had been duly served with process, and the bill was accordingly taken for confessed against him. But the fact does not otherwise appear in the record, nor does it appear that he was

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MAHAN, &c. vs MAHAN.

made a party by the complainant, in either his original or amended bills. He had an interest in the controversy, and was a necessary party, and should have been brought before the Court.

But 2dly. It is contended that the decree is erroneous upon the merits, and upon that question it will be proper to decide, so far as it depends upon the construction and effect of the written evidence of claim relied on by the complainant.

The relation of father and son is a good consideration to uphold a promise in writing by the former to convey land to the latter and authorize the Chancellor to decree a specific execution.

The complainant sets up and relies upon the writings exhibited, as three separate and distinct instruments. Whether they should be so considered, or virtually as constituting but one instrument, need not here be decided. For in either case, we think the complainant would be entitled, and only entitled to relief as to the two hundred acres of land embraced by the first writing, or that set up in the original bill. That obligation evidences a present gift of the land, and contains a covenant to have it surveyed, and an implied covenant thereupon to convey the title. The donor expressly stipulates that he will neither will, deed nor mortgage the land, but will consider it the right and property of his son. The relation between the parties is not only alledged in the bill, but appears upon the face of the obligation, to be that of father and son. That relation, though not a valuable, is deemed in law a good consideration; and, according to the case of *McIntire* vs *Hughes*, (4 *Bibb*, 186, and authorities there cited,) sufficient to authorize a specific execution of the contract in a Court of equity. It is true, in that case the contract was under seal, but the presumption is, it was executed prior to our statute, placing sealed and unsealed instruments of an executory character, upon the same footing.

As the record now stands, therefore, we are of opinion the complainant was entitled to the relief decreed as to the 200 acres of land described in the first obligation, but no further.

A gift of slaves though in writing, passes no title to the donee unless the wri-

The obligation in regard to the slaves was not to take effect until after the death of both the donor and his wife. The donee did not obtain possession at the time under the obligation, and according to its terms, was not then

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entitled to it. As the possession, therefore, did not accompany the gift, and as the writing evidencing it, was not recorded, the gift, as such, was void under the act of 1798, (2 *Stat. Law*, 1480,) as settled by this Court in *Pyle* vs *Maulding*, (7 *J. J. Marshall*, 202,) *and Howard* vs *Samples*, (5 *Dana*, 306.)

ting be recorded, or the possession accompany the gift. (2 *Stat. Law*, 1480; 7 *J. J. Mar.*, 202.)

Whether this and the last obligation or writing relied on can or not be regarded as a testamentary disposition by the deceased, it is not necessary to decide. We only decide that neither of them entitle the complainant to any relief in this case, as the record now stands.

Wherefore, the decree is reversed and the cause remanded, that the complainant may be permitted to amend his pleadings and bring the necessary parties before the Court, and upon his failure so to do within a reasonable time, that his bill and amended bills be dismissed without prejudice.

Cates & Lindsey for plaintiffs; *Husbands and Hewitt* for defendant.

70m583 f113 896

Clark's Administrator, &c. *vs* Rucker.

CHANCERY.

APPEAL FROM THE MEADE CIRCUIT.

Case 142.

Fraud. Trusts.

September 27.

JUDGE SIMPSON delivered the opinion of the Court.

J. C. conveyed his property to W. C. by absolute deed in secret trust, however; for the benefit of the wife and child of J. C. W. C. becoming involved, conveyed the property to the widow &c. of J. C. he having died. Held that the conveyance was valid, and the creditors of W. C. could not subject the property so conveyed to their debts.

JOHN CLARK having engaged in a trading adventure with a man by the name of Watts, and apprehending an unfavorable result in their speculation, made to his brother William an absolute bill of sale of all his slaves, for the purpose of placing them out of the reach of his creditors in the event that the expedition in which he had embarked proved unfortunate, with a secret understanding that the vendee was to hold them in trust for the benefit of the vendor's wife and infant child.

Shortly afterwards John Clark died, and William Clark took possession of his farm, and the slaves so conveyed to him. He managed them for the benefit of the widow and her child, sometimes admitting that he held the

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CLARK'S ADM'R. vs. RUCKER.

slaves merely in trust for them, and on other occasions claiming them as his own property. John Clark being indebted, at the time of his death, for the tract of land then in his possession, some of the slaves were sold by William and the proceeds of the sale applied to the payment of John's debts.

William Clark having afterwards, as one of the securities of the Sheriff of Meade county, in his official bond, become liable for considerable sums of money on account of the Sheriff's delinquency, executed to the widow and infant child of John Clark, deceased, a bill of sale, reciting the trust aforesaid, and transferring to them the residue of the slaves remaining unsold, in fulfilment of the trust.

The creditors who have unsatisfied judgments against the Sheriff of Meade and his securities, having applied to the Chancellor to set aside the last mentioned conveyance, on the ground that it was voluntary and fraudulent as to creditors, he decided that the slaves were still liable for the debts of William Clark, and decreed a sale of them for that purpose, and this question is now presented to this Court for its determination.

—But if the fraudulent vendee had retained the title to the property, it would have been liable for his debts.

Had the fraudulent vendee still retained the title to the slaves, they would no doubt have been liable for the payment of his debts, because as between the parties themselves, the contract being executed, would have been obligatory on them, and irrevocable at the instance of the vendor, from whom the title had passed by the bill of sale.

Though a fraudulent vendee may not be compelled to recovery to his fraudulent vendor, yet if he do so before any lien be acquired by a creditor of the vendee, such a creditor cannot reach the property.

The slaves, however, would still have been liable for the debts of the fraudulent vendor, and the creditors of the vendee would have had no just cause of complaint had the slaves been so applied, which shows that their right to have the slaves appropriated to the payment of their demands, is not an indefeasible one, although the fraudulent sale may have been the means of giving the vendee a delusive credit.

The sale and transfer to the widow and her child, although such as the fraudulent vendee could not have been compelled to make, yet having done that which in good conscience he should have done, and the title having been

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vested in, and the possession delivered to, the widow and child of the fraudulent vendor, before the creditors of the fraudulent vendee had acquired any lien on the property, the circumstances attending the transaction may be relied upon by them by way of defence to the claim asserted by the creditors.

So a conveyance in compliance with a previous verbal contract for land, will be valid against the claim of a subsequent purchaser by a written contract, though no action could be brought to enforce the first contract.

On a verbal contract for land, no action can be maintained, nor is such a contract enforcible in equity; yet if the vendor convey the land to the purchaser by parol, he can, when invested with the title, set up by way of defence, his verbal contract of purchase, against the claim of an intermediate purchaser, who though invested with an enforcible equity against his vendor, cannot deprive the purchaser by parol of the estate which he has acquired. So if a debtor, in payment of a debt barred by the statute of limitations, or a bankrupt in payment of a debt from which he is released by his discharge in bankruptcy, were to transfer property to his creditor, such transaction could not be overthrown by other creditors on the ground that the transfer was merely voluntary. The debtor in both instances being under a moral obligation to pay the debt, this obligation would constitute a sufficient consideration to support the transfer. For the same reason the conveyance in this case cannot be deemed merely voluntary. It may be, that the fraudulent vendee was induced to make this transfer alone from the consideration that he could not hold the property himself, and with a view to prevent his creditors from reaching it. He has, however, done that which justice required at his hands, and if he has been actuated by a fraudulent motive, this fraud on his part will not vitiate the conveyance. It is sustained, so far as the widow and infant are concerned, by a valid consideration, and they have in the transaction been actuated alone by a desire to obtain that property, which in justice and good conscience they had a right to, and which their vendor was under a moral obligation to convey to them; and have not participated in the fraud committed by him on his creditors.

As the widow and infant child of John Clark had acquired the title to these slaves and the possession of them, before the creditors of William Clark had obtained

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COLLETT vs JONES & HALL.

a lien thereon by execution or otherwise, we are of opinion that they cannot be subjected in their hands, to the payment of the debts of said creditors.

Wherefore, the decree of the Court below subjecting said slaves to the payment of said debts, and decreeing a sale of them for that purpose, is reversed and cause remanded for a decree on this subject as herein indicated.

Morehead & Reed and Hardin for appellant; *Grigsby and Harris* for appellees.

CHANCERY.

7bm586 f135 163

Case 143.

Collett *vs* Jones and Hall.

ERROR TO THE WAYNE CIRCUIT.

Executions. Exempted property. Insolvents..

September 28.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

A creditor of an insolvent debtor in violation of the statute, sold his only work beast, the debtor sued and recovered a verdict for the value of the work beast in damages. The creditor filed his bill to injoin the damages recovered for the trespass and illegal sale of the horse. Held that it could not be done.

JONES having recovered a judgment against Collett for $75, with interest and costs, caused his execution to be levied on a horse, the only work beast of the debtor, who was a house keeper with a family, and the horse having been sold whereby the execution was satisfied and so returned, Collett brought an action of trespass against Jones and Hall, who as Sheriff, had made the levy and sale. In that action a verdict was rendered for the plaintiff for $80 in damages, and this bill filed by Jones and Hall, (to the latter of whom Jones had executed a bond of indemnity, and had also assigned one half of his claim on Collett,) enjoins further proceedings on the verdict, and prays to set off the claim upon Collett against his verdict, on the alledged ground of his entire insolvency. This ground having been fully made out in proof, the Court on hearing the cause, perpetuated the injunction against further proceedings on the verdict, and decreed in favor of the complainants a balance of $27 80 found by calculating the interest on the debt of Collett to Jones, up to the rendition of the decree.

If the perpetuation of the injunction was proper, it was certainly inequitable to decree interest upon Collett's debt to Jones for any part of the time accruing after that

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debt was fully satisfied, and it was also erroneous to overlook the costs of Collett in the action of trespass, and in effect to prevent him from obtaining a judgment therefor. But the principal question in the case is, whether as the statute expressly exempts from execution the only work beast of a debtor, who is a *bona fide* house-keeper with a family, the decree securing to the creditor who has violated this exemption, the full fruits of his illegal act, is not itself an infringement of the statute, and does not by the principle of immunity which it establishes for its violation, virtually repeal it. Such, we think, is its obvious effect, and therefore, it cannot be sustained.

A Court of equity will not protect a party in the enjoyment of that which he has obtained by a violation of law, and thereby enable him to benefit by his own wrong.

To the argument that the statute exempted the horse and not a judgment for his value or for taking him, and that it would be inequitable to allow an insolvent debtor to draw from his creditor the only means of satisfying the debt, it is a sufficient reply, that but for the illegal act of the complainants, the subject to which the privilege of exemption attached, would have been unchanged, and they should derive no advantage from their own wrong, and that highly as the right of the creditor is regarded, it is by the paramount authority of the Legislature expressly postponed to the right of the debtor and his family to the services of an only work beast, and cannot, therefore, be preferred by a Court of equity, which would violate its own principles by protecting the creditor in an advantage wrongfully obtained against the superior, and as we may assume, prior equity of the debtor.

Can a judgment creditor attach in equity a judgment in favor of his debtor for the seizure and sale of property exempted from execution?—QUE.

Whether other creditors may or may not be entitled in equity to subject to their demands the judgment of Collett for the violation of his right in taking this horse, is immaterial to the argument in the present case. So far as they are concerned, it might not be essential to the preservation of the authority of the statute to extend its protection to a judgment against another for the violation of a privilege which they have respected, and at any rate they can, with a clear conscience, rely upon the difference between the damages for taking the horse and the horse itself, as the conversion would not have been the consequence of their own unlawful act.

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COLLETT vs JONES & HALL.

The argument that as the statute secures the right in the specific thing, it should only be understood as protecting the remedy for the recovery of that specific thing, and not the remedy for general damages, is more specious than solid. The debtor might not be able to give the security required for obtaining possession of the property in the action of replevin, or the property might be eloigned before he could do so; and he might, in that action or in detinue, have nothing at last but his judgment for damages. Some of the articles which are exempted by the statute, might be consumed before they could be reached by any remedy, and the only redress would be in a judgment for damages. But in truth the statute neither provides nor prefers any particular remedy for its violation. In exempting certain articles or species of property from execution, it prohibits a seizure of them by the creditor, and expecting obedience, it leaves the consequences of disobedience to be determined by the general principles of the law. Of these principles, one of the most important is that the mandate of a statute shall be enforced, and its authority maintained, by discountenancing every violation of its letter or spirit, and especially by withholding the aid of the law from giving effect to any such violation, and in many cases, by affording a positive remedy for the redress of the injured party, and to deprive the wrong doer of the fruits of his wrongful act. If a judgment creditor, seizing and appropriating the privileged property for the satisfaction of his debt, in violation of the statute, is entitled to a decree setting off the damages recovered for the seizure, against his debt, his illegal act is in effect sanctioned and legalized, the authority of the statute in the particular instance is prostrated, and a way opened for its successful violation in every case. Upon this principle the creditor would be absolutely secure in the appropriation of the privileged property to his debt, if he could succeed in placing it beyond the reach of a specific remedy. The statute imposes no peculiar duty or burthen on the debtor, and no restriction of his right or remedy, but gives unconditional exemption to certain property. And it is the province of the Courts to give to it such effect as not to allow, and much

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less to encourage either a violation or evasion of its provisions.

The complainants were, therefore, not entitled to any part of the relief which was granted by the decree. But as it is obvious that if they are to be deprived of the satisfaction received upon their judgment by the enforcement of the judgment against them, they should be allowed to coerce their judgment if it can be done, and to that end should be relieved from the effect of the return upon the execution evidencing a satisfaction of their demand; we are of opinion that unless upon a rule made in this case, the defendant, Collett, shall consent in the common law side of the Court, to an order setting aside the return on the execution, and authorizing further writ or writs of execution for enforcing the judgment against him, he should be enjoined from proceeding upon his verdict, except to obtain a judgment thereon, (which should never have been prevented by injunction,) and to enforce so much of such judgment as may exceed the amount of principal, interest and costs due on the judgment against him at the time of obtaining his judgment, and upon his compliance with the rule, the injunction should be dissolved the bill dismissed with costs.

Wherefore, the decree is reversed and the cause remanded for further proceedings and decree as above indicated.

James for plaintiff; *Harlan & Craddock* for defendants.

Strader *vs* Lambeth, &c.

ERROR TO THE JEFFERSON CIRCUIT.

Evidence. Partnership. Steamboats.

ASSUMPSIT.

Case 144.

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September 28.

Parol evidence is inadmissible to vary the terms of a written contract, unless there be fraud,

JUDGE SIMPSON delivered the opinion of the Court.

THE decision of the Court below, that the bill of sale from Reeder, made defendant, Strader, legal part owner of the boat Houma, and parol evidence was inadmissible to show that the bill of sale although absolute on its face,

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STRADER vs LAMBETH, &c.

created in reality only a trust, to which effect the Court instructed the jury, we deem erroneous. Between the parties to the instrument, such evidence, it is true, is only admissible, when the party offering it, first shows that the writing, either by fraud or mistake, was drawn differently from what the parties intended, or was executed under circumstances tending to prove that the contract was usurious. But when the parties themselves do not rely upon the writing as drawn, but admit the contract to be other than that which it exhibits, this rule has no application. Nor are strangers to the instrument concluded by its terms, or estopped to show by parol evidence, that the contract of the parties is different from what it purports to be on the face of the writing; and as estoppals where they exist must be mutual, it follows that in a controversy with strangers to the instrument, the parties to it are not themselves estopped to explain or contradict it by parol evidence: (1 *Greenleaf*, 317; 2 *Starkie*, 575.)

mistake or usury; but when the parties admit that the contract was otherwise than as appears by the writing, this rule has no application. Nor does the rule apply to strangers to the writing.—(1 *Greenleaf* 337; 2 *Starkie*, 575.)

As the liability of Strader depended on his being beneficially interested in the boat, or, on his having assumed ownership, or otherwise acted so as to have induced the plaintiff to give the credit on the faith of his responsibility, the exclusion of this evidence from the consideration of the jury, was evidently to the prejudice of the plaintiff in error. The party who holds the legal title is not made liable merely on that account, he may hold it merely in trust, and be neither actual or ostensible owner. His liability depends on his actual interest, or his agency in the control and management of the boat, and the character which he assumes before the public: (3 *Kent's Com.* 133; 16 *East.* 174; *Collyer on Partnership*, 684.)

A beneficial interest in a steam boat, without holding the legal title, will render the person holding such interest liable for services done or supplies furnished for the boat: (3 *Kent's Com.* 123; 16 *East's Rep.* 174; *Collyer on Part.* 684.)

Had the evidence been sufficient to show that Strader was part owner of the steamboat at the time the account to Lambeth & Thompson was created, and that the captain of the boat was placed under such circumstances as authorized him to bind the owners for necessary supplies and repairs, as what constituted necessaries for this purpose, was a question of fact proper alone for the jury to decide, the instruction to the jury that they might find that certain enumerated items in the account were for necessaries, if it be understood as a decision by the Court on

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this point, was improper. But the Court probably intended to inform the jury that the excluded items in the account could not be deemed necessaries, and as to the others, the jury had to determine from the evidence whether they were for necessaries or not.

It is contended, however, on the part of Lambeth & Thompson, that the Court erred in setting aside the first verdict and granting a new trial, that the verdict ought to stand, and a judgment be rendered thereon. We are however of opinion, the first verdict was unauthorized by the evidence. It was for an amount exceeding that which would be considered under any view of the evidence, as due on account of necessary expenditures. Besides, the law of the case was not fully presented to the jury in relation to the power of the captain of the boat to bind the owners, when he was in a situation to communicate with them without inconvenience, or prejudice to their interests.

We think, therefore, that the Court was right in setting aside the first verdict and granting a new trial. But for the error committed on the last trial, as before stated, the judgment must be reversed, and cause remanded for a new trial and further proceedings in conformity with this opinion.

Marshall and Pirtle plaintiff; *Fry & Page* for def'ts.

Whitman, &c. *vs* Gaddie.

ASSUMPSIT.

ERROR TO THE HART CIRCUIT.

Case 145.

Principal and surety. Replevy bond.

September 28.

JUDGE SIMPSON delivered the opinion of the Court.

A surety in a replevy bond may maintain assumpsit ag'st. all those against whom the original judgment was recovered, they all stand as principals to him, whether they

A JUDGMENT having been rendered against the plaintiffs in error, Whitman being the pricipal debtor, and the other persons named being his sureties, the defendants in the judgment entered into a replevin bond with Gaddie as security. An execution having issued on the replevin bond, and Gaddie having been compelled to pay it, brought this action of assumpsit against all the defend-

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WHITMAN, &c. vs GADDIE.

were sureties or principals in the original debt.

ants in the judgment, and the foregoing facts having been proved upon the trial, a motion was made for a nonsuit, which being overruled, a verdict was returned and judgment rendered for the plaintiff, for the whole amount he had paid on the replevin bond.

It is now insisted that the original sureties in the debt were the co-securities of Gaddie, who was security in the replevin bond; that they are not liable to him for the whole debt, but are bound only to contribute ratably; that this liability is a separate and not a joint one, and consequently the motion for a nonsuit should have prevailed. We deem the position wholly untenable.

Each one of the defendants in the judgment was legally liable for its whole amount. They are all principals in the replevin bond, and described as such on its face. Gaddie is their surety, and not the surety of any one of them alone. They are all principals, so far as he is concerned, and all liable to him for any payment he has made as their surety. There is no evidence of the manner in which he was induced to go security in the bond. In the absence of all testimony proving a contract between the parties, at the time the replevin bond was executed, defining their relative rights and liabilities, the legal presumption, from the attitude of the parties is, that the defendants in the judgment were regarded by all of them as principals; that Gaddie became security in the bond at their instance, and consequently the payment made by him afterwards being in discharge of a legal liability upon all of the defendants in the judgment at the time he entered into the bond as their surety, they are responsible to him for the amount paid.

Wherefore, the judgment of the Circuit Court is affirmed.

Harlan & Craddock for plaintiffs; *B. & A. Monroe* for defendant.

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Allen *vs* Sanders.

COVENANT.

APPEAL FROM THE MCCRACKEN CIRCUIT.

Case 146.

Covenants, dependent and independent.

September 29.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated and Judgment of the Circuit Court.

THIS is an action of covenant on an agreement in which the plaintiff in error stipulated to erect for the defendant a building of a certain description, to be finished in a specified time, and in a workmanlike manner, for which the defendant agreed to give to the plaintiff fifty dollars in hand, thirty two dollars and fifty cents when the work was completed, and eighty two dollars and fifty cents at a subsequent period.

This suit was brought for all the payments. The defence was, that the work is not done according to the contract. Verdict and judgment for the defendant; from which an appeal has been taken by the plaintiff.

The plaintiff's right to recover involves the construction of the agreement sued upon. If the covenants are entirely independent of each other, then the defence relied upon was invalid. If they are dependent, in whole or in part, to that extent the plaintiff could not recover without alledging and proving a performance upon his part.

It has been held, in a contract to do work where any money is to be paid before the work is to be done, the covenants are independent: (2 *Bibb* 15; 4 *Litt.* 253.) But the whole contract should be considered, to ascertain the intention of the parties: (9 *Dana* 64.)

It was decided by this Court in the case of *Craddock* vs *Aldridge*, (2 *Bibb*, 15,) that where any money is to be paid before the work is to be done, the covenants are independent; and in the case of *Mason* vs *Chambers*, (4 *Litt.* 253,) it is said that where the contract is entire and the performance of one side constitutes the whole consideration of the performance on the other, if one side is to perform a small part first, however small, it is evidence that he meant to waive the security of retaining his own performance and rest upon his action. But in the case of *McClure* vs *Rush*, (9 *Dana*, 64,) it is decided that the intention of the parties as collected from the whole agreement, is to govern. If upon the one hand it

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ALLEN
vs
SANDERS.

appear, that the party relied upon the covenant of the other for an indemnity in case of a breach, he will be left to the remedy which he has provided by the contract.

If one party rely upon the covenant of the other party for indemnity, he will be left to that remedy; but if upon performance, then performance is a precedent condition.

If, on the other hand, it be manifest by the terms of the contract, that the instalment to be paid, is the consideration of the prior services to be rendered, then the performance of the service is a precedent condition to the payment of the money. This rule of construction seems to be most reasonable; each part of the contract where the performance is to be partial and not entire, is made to depend upon its own terms. Part of the stipulations may be dependent and part otherwise, and in such case no action can be maintained on those which are dependent, without counter performance, or something equivalent, while without such performance the action would lie for a breach of other stipulations. If the intention of the parties cannot be gathered from the terms of the contract, and there is nothing to give it construction but the partial performance on one side, then the rule laid down in the case of *Craddock* vs *Aldridge* may apply.

A. stipulated to build a house for S. by a specified time, and S to pay $50 in hand, balance when the work was done, &c. Held that the payment of the $50 was an independent covenant, which might be sued upon without avering performance; but as to the part which was to be paid when the work was done, no suit could be maintained without an averment of performance.

Applying these rules of construction to the contract sued on, it is evident that the agreement by the defendant to pay the sum of fifty dollars in hand, was an independent stipulation, and that the plaintiff had a right to demand its payment without any averment of performance on his part, because it was to be paid before the plaintiff, by the terms of the agreement, was bound to do any part of the work. The payment of thirty two dollars and fifty cents was to be made when the work was completed. It was not due until that time, and the plaintiff, according to the evident intention of the parties, to show his right to demand it, had to aver and prove performance on his part, agreeably to the contract. The subsequent payment of eighty two dollars and fifty cents is expressly stated in the agreement, to be for doing the work, manifesting by the terms used, the intention of the parties to be, that the plaintiff's right to it was to be dependent on the performance of the prior service by him.

As the plaintiff then, had a right to recover the fifty dollars, without proving that he had performed or tender-

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ed performance on his part, the defendants plea relying upon the fact that the work was not done according to the contract, inasmuch as it purported to be a defence to the whole action, was not a good plea. It only contained a defence to the payment of the two last instalments, and had it been plead to that much instead of the whole of the plaintiff's action, it would have been a good plea to that extent. The instruction of the Court to the jury on the trial, is liable to the same objection. It made the plaintiff's right to a verdict for any thing, depend upon his having executed the work in the manner he had bound himself to do by the contract, instead of confining the instruction, as should have been done, to the two last instalments.

Wherefore, the judgment is reversed and cause remanded for a new trial, and further proceedings in conformity with this opinion.

Husbands for appellant; *Herndon* for appellee.

Patterson, &c. *vs* Chalmers.

ASSUMPSIT.

APPEAL FROM THE MCCRACKEN CIRCUIT.

Case 147.

Steam boats. Merger. Partners and partnership.

JUDGE SIMPSON delivered the opinion of the Court.

September 29.

THIS is an action of debt, brought in the name of John G. Chalmers, as surviving partner of the late firm of Lawrence & Chalmers, against the plaintiffs in error. The declaration contains no express allegation of the death of Lawrence, and for this reason, it is contended, that it is defective. We are, however, of a different opinion. The plaintiff having stated in the commencement of the declaration, that he sues as surviving partner, the implication of the death of the other partner necessarily arises; and although if the declaration had contained an express averment to that effect, it would have been more technically correct, yet the omission is supplied by the inference unavoidably resulting from the character of surviving partner, assumed by the plaintiff.

The declaration being in the name of one as surviving partner, necessarily implies the death of the other partner.

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PATTERSON, &c. *vs* CHALMERS.

Debt on a writing and debt on simple contract, may be joined in the same declaration: (1 *Chitty*, 229.)

The first count in the plaintiff's declaration, having been founded on a written obligation, and other counts on simple contract, afterwards added by way of amendment, they are objected to on the ground that it is an improper joinder of different forms, as well as different causes of action. The counts in the amended declaration, however, are not, as supposed, counts in assumpsit, but in debt on simple contract. They differ from those in assumpsit in not stating any promise, and in concluding in the usual form of a declaration in the action of debt on simple contract. Debt on bond or other specialty, may be joined with debt on simple contract; (1 *Chitty's Pleadings*, 229.) So that there is not, in this case, a misjoinder either in the form or cause of action.

Samuel Patterson, Sen., one of the defendants in the action, filed a plea of *non est factum* to the writing declared on in the first count, and the plea of *nil debit* to the other counts in the plaintiff's declaration.

The writing to which the plea of *non est factum* was filed is as follows:

"*New Orleans, 24th July*, 1839.

"$2,462.

"One day after date the steamer Sultan and owners, promise to pay Lawrence & Chalmers, or order, two thousand four hundred and sixty two dollars, for value received. *Jesse Pell, Master.*"

The following facts were proved on the trial: On the 20th of December, 1837, Jesse Pell, B. W. McIntosh and the firm of D. W. Patterson & Co. agreed to become partners in the boat aforesaid, each having an interest therein of one third. The firm of Patterson & Co. then consisted of D. W. Patterson and Samuel Patterson, Jr. On the 10th day of November, 1838, Samuel Patterson, Jr., for the purpose of paying to his father, Samuel Patterson, Sen., the defendant in this case, a debt which he owed him, sold and transferred to him all his interest in the firm of D. W. Patterson & Co., and his undivided interest in the steam boat Sultan. Samuel Patterson, Sen. afterwards, on the 5th February, 1839, sold to D. W. Patterson all the interest acquired by him by his purchase from Samuel Patterson, Jr., as well in the firm as

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in the steam boat Sultan. During the time that Samuel Patterson, Sen. was part owner of the Sultan, he gave directions in relation to the management of the boat and exercised the usual control of a part owner. The debt sued for was created, with the exception of one item, within the same period. But the execution of the writing sued on was after he ceased to have any interest in the boat.

We deem it unnecessary to determine, whether the writing sued on should be regarded as a mere evidence of indebtedness by the part owners of the boat, given by the master, or as an actual obligation on them to pay the amount promised. If it be an obligation on the owners, it must as it purports, be the obligation of the then, and not former owners. And as the defendant, Samuel Patterson, Sen., was not at that time, a part owner, it is not his obligation; and having relied upon the plea of *non est factum*, the plaintiff could not maintain his action against him on the writing.

The exection of a note merges the simple contract between the same parties. A joint liability on simple contract may be extinguished by accepting the obligation of part only of the joint contractors, in satisfaction of their joint liability; but if it be not so accepted, the joint liability still remains: *Doniphan, &c. vs Gill*, (1 *B. Monroe*, 199.)

It does not necessarily ensue, however, admitting it to be the promissory note of the then owners of the boat, that it is an extinguishment of the antecedent liability of this defendant. It is well settled, that by an execution of a promissory note, the liability on the simple contract between the parties, which is of inferior dignity, is merged. A joint liability on a simple contract may also be extinguished, by the acceptance of the obligation of part only of the joint contractors, in satisfaction of the joint liability. But if, as the evidence here tends to prove, the note was accepted by the obligees, not as the note of the persons alone who were part owners of the boat at the time of its execution, but as the joint undertaking of them and the defendant, Samuel Patterson, Sen., inasmuch as it is, according to its legal effect, the obligation of the other defendants alone, it was never accepted as a satisfaction of their joint liability, and unless it had been so accepted, it would not have the effect of extinguishing that liability. And if the other defendants be not alone liable on the note, which cannot be, unless it be deemed an extinguishment of the previous joint liability, the remedy for enforcing the demand must be joint on the simple

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PATTERSON, &c. vs CHALMERS.

contract, which must be regarded as still subsisting: *Doniphan and Smoot* vs *Gill*, (1 *B. Monroe*, 199.)

The extent, however, of the liability of Samuel Patterson, Sr., depends in some degree upon the question whether he was partner or merely part owner of the steamboat Sultan. If he was partner, the defendant, Pell, who was also a partner, as well as master of the boat, could impose on him a more extensive liability, and bind him further than one part owner can the other part owners, who are considered merely as tenants in common. It is, to be sure, contended that he was not even a part owner. The proof, however, contradicts this assumption, and manifests conclusively the fact of his ownership. The object which he had in view in making the purchase and obtaining the transfer of the interest of Samuel Patterson, Jr., is immaterial. Having become the proprietor of that interest, which was a beneficial one, and having assumed some control over the boat, and the articles in the plaintiff's account having been furnished on his credit, as well as that of the other part owners, there can be no doubt of his liability as part owner. This is however, in our opinion, the full extent of his liability. Were it conceded that a regular partnership existed in the boat, and in its business, at the time the defendant, Patterson, acquired an interest in it, the sale of that interest by one of the partners, operated as a dissolution of the partnership, and it is evident that no partnership was afterwards formed between the defendant, Patterson, and the other part owners, which would have required an agreement to that effect, but that they regarded themselves as part owners merely. The law does not make part owners partners, it requires an agreement among themselves, to create a partnership in the boat: (*Story on Partnership*, 612.) In the absence of such an agreement, the law considers them as tenants in common, each having a distinct, although undivided interest in the whole: (*Abbott on Shipping*, 68.)

Part owners of a steam boat are not partners without a contract of partnership.

One part owner of a steamboat can bind another for necessary repairs and supplies. The master of the boat can bind all the owners to the same extent. But neither master nor part owner has any implied authority to order

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Insurances to be effected on the part of the owners, and a part owner cannot by doing so, charge the others with any part of the premium: (*Collyer on Partnership*, 682; *Abbott on Shipping*, 76.) Inasmuch, therefore, as nearly one third of the plaintiff's demand is for insurance, there is no evidence in this case which authorized a verdict in his favor for that portion of it.

ship: (*Story on Part.* 62.) They are merely tenants in common, each having a joint, but undivided interest:—(*Abbott on Shipping*, 68) One part owner may bind the others for repairs and supplies. The master can bind all to the same extent; but neither can procure insurances for the others.

It is unnecessary to decide upon the objection taken to the judgment, that the contract set out in the plaintiff's declaration imposed a joint liability on the defendants and another individual by the name of —— Disharoon, dec'd., when the evidence does not manifest any liability on the part of Disharoon. This objection only applies to the first count, the other counts in the declaration containing no allusion to Disharoon, but averring and relying on the liability of the defendants alone, and as the case will depend in its future progress, upon the amended declaration exclusively, this objection may not again arise.

The law, as expounded by the Court below in its instructions to the jury, is inconsistent with the principles contained in this opinion.

Wherefore, the judgment is reversed, and cause remanded for a new trial and further proceedings in conformity with this opinion.

Robertson and Husbands for appellants; *Harlan & Craddock* for appellee.

Camp *vs* Prather, &c.

ERROR TO THE HICKMAN CIRCUIT.

Ejectment. Entries.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THIS action of ejectment was brought on the demise of Camp, claiming as patentee of two quarter sections of land lying west of the Tennessee river, by patents dated in 1836, against Prather and Jones, claiming under a patent dated in 1826, granting to Bazzel Prather, assignee

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CAMP vs PRATHER, &C.

of Richard Brashear, 1,000 acres of land in the district set apart for the officers and soldiers of the Virginia State Line, in consideration of part of a Land Office Military Warrant, entered August 6th, 1784, and surveyed March 20th, 1825. The patent of the defendant being the oldest, the plaintiff read in evidence the entry of Richard Brashear, and relied upon the point that the patent covers no part of the land appropriated by the entry, and is therefore wholly void, under the act of 1820, authorizing the military entries west of the Tennessee, to to be surveyed and carried into grant. The entry of Brashear, dated August 6th, 1784, calls to begin "due south of the town of Columbia, on the boundary line of Virginia and North Carolina, to run eastwardly with the line 400 poles, unless interrupted by elder entries; and in that case to begin on the line to the east of such entry, and run 400 poles east on said line, and then at right angles for quantity." The survey, bearing date March 20th, 1825, was also read, beginning "due south of the town of Columbia, on the State line, and running east, &c. according to the calls of the entry; and it being shown that the State line as fixed in 1820, by the States of Kentucky and Tennessee, from the Tennessee river to the Mississippi, and on which the land was surveyed, is about ten miles south of what would be a continuation of Walker's line, run in 1779-80, as far as the Tennessee river, and upon proof, that from 1821 up to the time of trial, it was generally understood that Walker's line, if continued without change of course, would pass about ten miles north of the actual State line, it was contended in the Circuit Court, and is now contended, that the entry of Brashear should be understood as calling for the continuation of Walker's line as the boundary line between Virginia and North Carolina, and that the survey upon the true State line is therefore entirely variant from the entry.

Conceding all that can be assumed as the basis of this argument, that the locator of this entry may have supposed that Walker's line, as far as it went, that is, to the Tennessee river, was the true boundary between Virginia and North Carolina, and that therefore a continuation of

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that line would be the true boundary to the Mississippi, it may be a consequence that the locator supposed, if he thought upon the question at all, that the land located by this entry would lie upon Walker's line continued. But as that line had not in fact been run west of the Tennessee, as no body at the date of the entry knew or even conjectured where it would run in the vicinity of this location, near the bank of the Mississippi, as the entry does not call for that line, but for the boundary line between the two States, and as in point of law and fact, the true line was in latitude 36 degrees 30 minutes north, where it has been actually run, and there was not at the date of the entry, nor afterwards until the ascertainment and authoritative adoption of this true line in 1819 and 1820, any other line, actual or reputed, it would be most unreasonable, first to conjecture that the locator intended to refer to Walker's line, and then upon that mere conjecture to conclude that the entry could not be properly surveyed on the true line.

It is a valid entry which gives such description of its shape and locality, as will enable others who may desire to appropriate the adjacent land to ascertain with reasonable certainty what has been before appropriated. It is the terms used in the entry and not the private intention or opinion of the locator, which is to fix the location.

It is not necessary that the locator should have actually seen, or even in his own mind have fixed upon the precise piece of land which he intends to appropriate. It is sufficient if in his entry he give such a description of its shape and locality as will enable others who may desire to appropriate the adjacent land, to ascertain with reasonable certainty what has been before appropriated, which implies the requisition that the description shall be such as will enable one properly skilled, to ascertain the locality and extent of the land attempted to be appropriated by the prior entry, and in fact, to make a survey of it corresponding with the entry. The intention of the locator is only material so far as it is indicated by the terms used in describing the land. If his description comes up to the requisitions which have been stated, the land described is appropriated by the entry, although he may have supposed that he was describing and have intended to appropriate other lands. It is the terms of the entry and not the private intention or opinion of the locator which fix the location.

It is true that an entry, clear and unambiguous on its face, and apparently sufficient, may in applying it to the ob-

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CAMP vs PRATHER, &c.

jects called for, be found subject to a latent ambiguity, arising from the correspondence of two or more objects with the terms of a particular call or description; and the uncertainty thus produced may, unless removed by some decisive circumstance, make the entry wholly ineffectual. But the call in this entry, for the boundary line between the two States, cannot be subject to this objection, because there never was but one boundary line in law or fact, from the Tennessee to the Mississippi, and there never was any other reputed boundary. At the date of the entry and until after the true line was run and established, there were no white inhabitants in that region. There is no evidence that any of the few individuals who were engaged in making entries for the officers and soldiers, knew at what point Walker's line struck the Tennessee river. And it may be regarded as certain that none of them, nor any others, for many years afterwards, knew or attempted to define the position of Walker's line continued, either on the Mississippi or in the country between it and the Tennessee. There was then but one object or line to answer to the call for this boundary line, and as the position of the line, though not ascertained at the date of the entry, was fixed by the charter and laws of Virginia, at thirty six degrees thirty minutes north latitude, the entry could not, at its date, have been properly applied to any other line.

The entry calling to begin at the intersection of a line running due south from the town of Columbia with the State line, which is the line of 36 deg. 30 minutes north latitude, but which had not then been run and marked, held to be a valid entry.

The line at thirty six degrees thirty minutes north, being ascertainable with reasonable certainty, by mathematical instruments and calculation, we suppose that the call to begin at the intersection of a line running due south from the town of Columbia, with a line at thirty six degrees thirty minutes north latitude, would have been a sufficient call, and that the fact that a line had been run in another part of the country nearly 100 miles distant, which was intended to be on that parallel and which was adopted by public authority as being so, would neither change the true line of latitude, nor deprive the locator of his right to have his land surveyed upon that line agreeably to the precise words of his entry. The fact referred to might furnish a deceptive mode of ascertaining the point called for as a beginning, to those who should

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choose to resort to it. But being only one means and an uncertain one, of ascertaining it, the mere possibility that a subsequent locator might resort to the deceptive instead of the true means of ascertainment, would seem to be scarcely a sufficient objection to the certainty of the location. Even the conclusive adoption by the State of Virginia, of Walker's line as far as run, as the boundary line, and upon the supposition that it was the line of thirty six degrees thirty minutes north, would not have precluded the State nor any of her citizens, in subsequently enquiring for a point on the Mississippi in the latitude of thirty six degrees thirty minutes north, from resorting to the proper astronomical observations for ascertaining the true point, though the enquiry were made with the especial view of finding or of fixing the southern boundary of the State at that point. It could not have been supposed that the State in any future attempt to fix the boundary line from the Tennessee to the Mississippi, would have rested satisfied with directing a mere continuation of Walker's line, without any resort to the original and true means of ascertaining the line to which, by her charter and her laws, her limits extended. Nor can it be assumed that an individual of competent skill and means, who desired to ascertain a point on or near the Mississippi, in the line of thirty six degrees thirty minutes north, would have gone to the Tennessee river to find there the termination of Walker's line, and have continued it for many miles through a wilderness, as the means of attaining his object. The more reasonable presumption would seem to be, that he would resort to the direct means of ascertaining it on the Mississippi, as being not only the most certain, but also the most convenient.

An entry calling for the State line which had not then been run and marked, nor had any reputed position, but which calling for the line of lat. 36 deg. 30 min. was ascertainable. Held to be valied, at least

The real question as to the sufficiency of an entry calling for a line of latitude not ascertained nor having a reputed position near the particular point, arises not upon any ambiguity, patent or even latent, but from the fact that the ascertainment of the point called for, so as to give actual location to the entry, or to find the particular land described by it, requires a resort to unusual means not ordinarily resorted to by locators or surveyors, nor

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CAMP vs PRATHER, &c.

from the date at which the boundary was fixed by the proper authorities.

ordinarily within their reach. The question is, whether an entry requiring such means for ascertaining its precise position on the ground, should be sustained. The objection is not less if the locator or surveyor were required to ascertain the point where Walker's line terminated on the Tennessee, and to continue it thence to the Mississippi, than if he were required to ascertain the latitude at once on the Mississippi. But in setting apart this district, extending to her southern boundary, and authorizing its appropriation by the officers and soldiers of her State troops, Virginia intended to subject the whole and every part, to such appropriation. And as the southern boundary was not demarked nor otherwise ascertained, but rested on the call for the line of thirty six degrees thirty, locators desiring to locate lands adjacent to it, must have been expected to ascertain it at their peril, or must have been allowed to call for it without actual ascertainment of its position, as a proper object, by reference to which their locations might be fixed. In either alternative the call for the boundary line would be sufficient. And whatever might be said of an entry calling for a line of latitude which had not been ascertained, we cannot doubt that a call for the boundary line of the State which if not at the time ascertained, must of course have been ascertainable, and expected to be ascertained by public authority, whenever the public interest should require it, is to be regarded as good. True there might be great hazard in attempting to survey such an entry before the State boundary should be fixed by public authority, and considered as an entry calling for the State boundary, wherever it should be fixed, in which sense we should still deem it good, it might be entitled to take date only from the time of fixing the boundary, because until then it would not point out any specific land to be appropriated.

But we perceive no other objection or disadvantage necessarily incident to such a call, and as there was a suspension of all locations and surveys in the district west of the Tennessee, from 1784 until 1820, after the boundary had been authoritatively fixed; and as the survey was in fact, made upon the boundary as then fixed, and upon

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the line of thirty six degrees thirty minutes, which was the legal boundary at the date of the entry, and is the actual boundary; and as there was no other line having the reputation of being either the boundary line or the line of thirty six degrees thirty minutes, we are satisfied that the entry was properly surveyed, and that the patent conforming to the survey, corresponds also with the entry and was, therefore, valid and effectual to invest the patentee with the legal title, and to bar a recovery on a junior patent.

Wherefore, the judgment is affirmed.

Husbands for plaintiff; *Pirtle and E. I. Bullock* for defendants.

Lee *vs* Lee *et al.*

EJECTMENT.

APPEAL FROM THE MARION CIRCUIT.

Case 149.

Estates in fee. Remainder. Limitation. Executory devises. Uses. Shifting or springing.

September 30.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

ON the 3d day of June, 1814, Philip Lee and wife, for the consideration expressed, of five pounds, conveyed "to Richard Lee, his heirs and assigns, or in case of the death of said Richard without lawful heirs, then to Samuel Lee, of the county of Adair, &c., and his heirs forever," a certain tract of land in the county of Washington, &c., "to have and to hold the said tract or parcel of land unto the said Richard Lee and his heirs, or in case of said Richard's death without lawful heirs, then to said Samuel and his heirs, after the death of said Richard," reserving an estate for life to the grantor. After the death of the grantor, Richard Lee being in possession, died without having had any children, and after having, by his will, which was proved and admitted to record, devised all his possessions, including land, &c., to the devisees therein named, who succeeded to the possession. Against these devisees and the widow of Richard Lee, who was also in possession, this action of ejectment was brought

A conveyance to "Richard, his heirs and assigns, or in case of the death of said Richard without lawful heirs, then to Samuel and his heirs forever, to have and to hold the said tract or parcel of land unto the said Richard and his heirs, or in case of said Richard's death without lawful heirs, then to the said Samuel and his heirs after the death of said Richard," reserving an estate for life to the grantor is void as to Samuel.

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LEE
vs
LEE *et al.*

on the demise of Samuel Lee. And a verdict having been rendered for the defendant, under the instructions of the Court, the sole question presented for our consideration, in revising the judgment thereon, is whether, under the deed of Philip Lee, Samuel Lee took an estate in the land entitling him to the possession after the death of Richard Lee.

A fee cannot be limited upon, or after a fee, by deed according to the common law; but in modern times is allowed to be done by way of executory devise, or in a deed by way of springing or shifting executory use, dependent upon conditions that may happen within a reasonable period.

Upon the face of the deed this is a clear case of an attempt to limit a fee upon or after a fee, which according to the ancient common law, could not be done by any mode of conveyance, but is in modern times allowed to be done by way of executory devise, or in a deed by way of spring or shifting executory use, dependent upon a contingency that may happen within a reasonable period, which is defined by the cases and rules applicable to the subject. Upon the face of the deed, without regard to external circumstances, the words "lawful heirs," have precisely the same signification and effect as the word "heirs" standing alone would have, and the deed conveys a fee simple absolute to Richard Lee, and attempts to limit upon it in case of his death without heirs, a similar estate to Samuel Lee. The deed does not convey the legal title to a trustee, limiting the uses first to one and then to anoher, upon contingency. And if it did, it would be difficult to find in it any restriction of the contingency to a period which could be deemed reasonable. It is not, however, a deed to uses, but a deed conveying the legal title to A. and his heirs, or in case of the death of A. without heirs, then to B. and his heirs. The words "after the death of said Richard," found in the habendum, and not in the granting part of the deed, have never even in cases of executory devise, been understood as fixing the contingency of dying without heirs, to the time of the death of the person referred to. And they do not seem to vary the effect of the previous words in which the contingency is expressed.

The limitation to Samuel is void according to the common law, as the whole estate passed to Rich-

Upon this construction of the deed, the limitation to Samuel Lee, is void upon common law principles, because the whole estate is conveyed to, and vested in Richard Lee, the first taker. "A fee cannot at common law, be limited on a fee, as if lands are limitod to one

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and his heirs, and if he dies without heirs, then to another, this last limitation is void." (*Fearne on Remainders*, 373.) On this subject, references need not be multiplied.

ard, the first taker: (*Fearne on Rem.* 373, 467.)

The rule is general, that a devise, over after a dying without heirs, is void: (*Fearne*, 467.) But it is contended that as Samuel Lee was in fact the brother of Richard Lee, and as the latter therefore could not die nor be dead without heirs, so long as the former or his heirs survived, the import of the words "lawful heirs" must be restrained, and they should be understood as synonimous with children. Whence it is argued, that the deed should be understood as intending to convey an estate for life to Richard, remainder to his children, if any, at his death, and if none, remainder to his brother Samuel and his heirs. But suppose at the death of Richard Lee, he had left no child, but a grand child or grand children, can it be said that the parties intended the estate in that event to go to Samuel Lee, instead of going to Richard Lee's grand children? And as it cannot, in our opinion, be so determined, does it not follow that the construction contnded for, would not, in contingencies which might well have happened, conform to the intention of the parties. The deed, if construed according to the external circumstances, must be construed according to circumstances existing at its date, and not according to those which may have afterwards happened; and although Richard Lee was unmarried at the date of the deed, the contingency of his afterwards marrying and having children, was evidently contemplated, and the event of his leaving no child but grand children living at his death, must be regarded as within the scope of the deed, if it were in terms what it is attempted to be made by construction, what would be its effect if such were its terms, we need not enquire.

In wills, if the person to whom a limitation over after, or if the first devisee should die without heirs, be himself capable of being heir, then the word

Conceding that in case of a deed as in that of a will, the fact, though not appearing in the deed, that the person in whose favor the limitation over is made after a grant to one and his heirs, would himself be heir to the first grantee, would operate to restrain the import of the words by which the first estate is granted, and by showing

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SIMRALL vs O'BANNONS.

that it was not a fee, avoid the rule which prevents an effectual limitation after a fee, it by no means follows and has not been proved that in this case the first estate is to be reduced to a life estate, or that the word "heirs," used in creating the first estate or in describing the contingency on which the second is to take effect, should be taken as synonimous with "children." On the contrary, it is well settled even in the case of wills, that if the person to whom a limitation over after, or if the first devisee should die without heirs, be himself capable of being heir to the first devisee, the word heirs thus used must be understood as meaning "heirs of the body," and that the first devisee takes an estate tail: (*Fearne on Remainders*, 467,) which by our law is made a pure and simple fee, (*Stat of* 1796, *Sec.* 10, *Stat. Law*, 442,) and the limitation of the subsequent estate by deed, is in this view also void.

"heirs" must be understood as meaning "heirs of the body," and the first devisee takes an estate tail: (*Fearne on Rem.* 467) which by our statute is made a fee simple: (1 *St. Law*, 442,) and the limitation void.

The instructions given by the Circuit Court were conformable with this view of the law, and there being no contest upon the facts of the case, the judgment is affirmed.

Harlan and Shuck for appellant; *W. B. Booker* for appellees.

CHANCERY.

Case 150.

Simrall *vs* O'Bannons.

APPEAL FROM THE SHELBY CIRCUIT.

Usury. Partners. Waiver of equity. Assignees.

September 30.

JUDGE SIMPSON delivered the opinion of the Court.

IT very certainly appears from the evidence, that there is usury in the note of $1,315 20, assigned by M. W. O'Bannon to J. B. & R. W. O'Bannon. To the extent of this usury, Simrall is undoubtedly entitled to relief. Were it conceded that M. W. O'Bannon, his partner, had agreed to be accountable for this usury in the settlement of their partnership accounts, that agreement like all others entered into for the same purpose, is illegal and invalid, and does not preclude Simrall from availing

No promise made by a party not to plead or rely upon usury is obligatory.

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himself of his right in equity to have the usury purged out of the transaction. Nor is any promise made to the lender, not to plead or rely upon usury, obligatory on the party making it; it is but in substance, a promise to pay the usury. Every usurious agreement embraces such a promise, yet it does not deprive the party of his equitable right to exclude the usury, and absolve himself from its payment.

The testimony leaves the matter somewhat doubtful, whether at the time the note was given the payee avowed his intention to assign it, or whether the understanding of the parties was, that it was taken as a mere evidence of indebtedness by the firm, to one of its members, its payment ultimately depending on the result of the settlement and adjustment of the partnership concern. If, however, it were conceded that Simrall, at the time the note was executed, understood that it was to be transferred to J. B. & R. W. O'Bannon, that would not change the equities of the parties.

If one execute his note to a third person, or induce him to buy his note, it is a waiver of any equity against the payment thereof.

It is true, that had he, by his conduct, induced them to take the note, or had he executed it directly to them for the purpose of paying their debt, he would by so doing, have waived, so far as they are interested, any equity he might have against the payment of the demand. But although he may have understood that the note would be assigned, he may be presumed also to have known that the assignee would take it subject to all the equities existing against it in the hands of the assignor, and therefore, no implication can arise from the execution of the note, that he intended to waive, in favor of any third person, any defence that he might have against it. Nor do the assignees either alledge or prove that they purchased the note in consequence of his conduct or representations. It was received by them in discharge of a previous liability of the assignor to them, and so far as appears, without any information in relation to the circumstances attending its execution.

A partner who is a creditor of the firm, being himself liable for all the debts of the firm, cannot co-

A partner who is the creditor of the firm, being himself liable for all the firm debts, cannot enforce payment of his demand until the debts due to other creditors are all paid. When that is done, if upon a settlement be-

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SIMRALL
vs
O'BANNONS.

ercе payment of his demand until the firm debts be all paid, when he may be paid if there be a sufficiency of assets of the firm, if not, the loss must be apportioned amongst the members of the firm.

tween him and the other partners, there is any thing due to him, he is entitled to it out of the assetts of the firm, if there be sufficient for the purpose, if not, the loss, whatever it may be, must be apportioned among the members of the firm. The assignees of the partner occupy his place, their attitude is the same, and their rights such as he would have had at the time of notice of the assignment, if he had still held the note himself. A note in the name of the firm to one of the partners, is a writing somewhat anomalous it its character, it creates but an imperfect legal obligation, it is not enforcible at law according to its import, but if enforced at all, has to be regarded for that purpose, as imposing a separate legal liability on one of the partners. It is, in effect, merely the evidence of one item of indebtedness in the account between the partners; its availability in equity depending upon the condition of the firm, and relative interests and liabilities of the partners as such. If assigned away the assignee takes it with all its imperfections and drawbacks, legal and equitable. And as the partner himself, had he still retained the note, could only enforce payment of its full amount from the firm, in the event that the firm effects were sufficient to discharge his, as well as all other demands against it, his assignees are in no better condition, and their right to have the full amount of their demand made out of the other partner who has had the control and management of the partnership concerns, depends on the same contingency. The assignor, as one of the partners, is no doubt responsible to the assignees for the full amount of the consideration of the assignment, but the effort in this case by the assignees, is to hold the other member of the firm, (there being only two partners,) individually responsible for the whole demand. To render him so liable, it should appear on a settlement of the partnership transactions and dealings, that he is indebted to his partner, the assignor, in that amount.

A note in the name of a firm to a member of the firm, is evidence of an item of indebtedness between the members of the firm; but not enforcible at law according to its import. Its availability in equity depending upon the condition of the firm. If assigned, the assignee takes it subject to all its imperfections & drawbacks as the payee held it.

Wherefore, the decree dismissing the complainant's bill with costs, and dissolving his injunction with damages is reversed, and cause remanded, that a full settlement of the partnership may be made, the amount of usury in the loan ascertained and excluded, and the rights

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of the parties settled and adjusted according to the principles of this opinion.

McHenry and Cates & Linsey for appellant; *Pirtle and W. Bullock* for appellees.

Attorney General *vs* Wallace's Devisees.

CHANCERY.

ERROR TO THE MASON CIRCUIT.

Case 151.

Wills. Devises. Charities. Jurisdiction. Survivorship.

October 1.

JUDGE BRECK delivered the opinion of the Court.—Chief Justice Marshall did not sit in this case.

THE will of Thomas Wallace, who died in the county of Fleming in 1840, having a large estate, contains the fellowing provisions:

The clause of the will of Thos. Wallace out of which the controversy arises.

"I do hereby will and bequeath all my estate, real and personal, of every description and kind whatever, except the sums hereafter willed to other persons; to my beloved daughter, Amelia Sarah Wallace, on the terms and conditions hereafter named, viz: I will all my real estate, and two thirds of all my personal property of every description that I may own at my death, slaves excepted, to my beloved daughter Amelia, above named, to be entailed to her and her child or children, never to be at the disposal of any other person or persons during her natural life, nor at her own disposal, only that she will receive all the profits, rents, interest, hire and benefit accruing therefrom, for her use and support, during her natural life. The one third of all personal estate, with exception of slaves, to be at her, Amelia's, disposal, when she becomes of lawful age, but in the event of the death of my above named daughter, Amelia Sarah Wallace, without child or children, or should she not have any child alive at her death, or should her child or children die without issue, in either event, I do will and bequeath all, or the whole of my estate that my daughter may own at their death, without issue as above stated, to be disposed of on the following terms: One fourth to the children of my sister Rebecca Cummings, deceased, or their

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ATTORNEY GENERAL vs WALLACE'S DEV.

heirs; one fourth to the child of my sister Fanny McConnell, or her heirs; one fourth to Thomas and Mark Wallace, sons of brother David Wallace, or their heirs; *and the remaining fourth to such charitable and benevolent institutions as may appear to be most useful in disseminating the Gospel at home and abroad.*"

The codicil.

The will bears date the 6th May, 1835. In a codicil thereto annexed, on the 9th January, 1836, there is the following clause: "I nominate and appoint my trusty friends hereafter named, trustees, with the necessary powers, to hold in trust for the use and benefit of all my heirs, or all the purposes and persons therein named, and dispose of it agreeably to the provisions of my will: Rev. Andrew Todd, John Chambers, of Washington county, William Hodge, of Mason, and John Andrews, of Sherburn Mills."

In June, 1841, the will was admitted to record in the Fleming County Court.

In the original will, William Hodge, John Andrews, and L. W. Andrews, were appointed executors, but they declined to qualify, and Thomas Porter was appointed administrator, with the will annexed.

The testator's daughter intermarried with F. A. Andrews, and died shortly after her father, without issue.

The bill, its allegations and object.

In December, 1843, this information, or bill in chancery, in the name of Owen G. Cates, Attorney General for the Commonwealth of Kentucky, by W. H. Cord, as relator, was exhibited in the Fleming Circuit Court, praying to have enforced and executed the charitable devise in the will. The bill alledges that the trustees had declined to act, and that no steps whatever had been taken for carrying out the devise. It also charges, that the personal estate of the testator had been squandered, and that a portion of the real estate was improperly and illegally held and claimed by Marshall and others, through the unauthorized and fraudulent acts of F. A. Andrews. The trustees, administrator, devisees and heirs, and others claiming portions of the estate, were made defendants.

Answer of defts.

The trustees in their answer, state they at first were not inclined to accept the trust, but subsequently, and be-

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fore the exhibition of complainant's bill, three of them had determined to undertake its execution. That a bill had been filed by Dobbins and wife, in the Fleming Circuit Court, claiming a special legacy under the will, making the trustees defendants, and that they, or three of them had filed a cross answer, praying that the devise in charity might be enforced. Andrews, the other trustee, afterwards answered the bill of the Attorney General, and accepted the trust. The other defendants resisted the relief sought, and asserted as devisees, heirs and otherwise their respective claims to the estate.

During the progress of the cause, the Attorney General, upon the ground that the trustees were parties, and had answered in the suit of Dobbins and wife, claiming the devise in charity, and their right to administer it, directed, by his written order, this suit, or the suit prosecuted in his name, to be dismissed, but afterwards modified the order leaving the propriety of dismissing it in the discretion of the Judge.

Decree of the Circuit Court.

The cause was subsequently removed to the Mason Circuit Court, when after various amendatory and cross pleadings, it was heard, and the complainant's bill dismissed, but without prejudice, and without costs.

To reverse that decree, the relator, in the name of the Attorney General, has brought the case to this Court.

Before we proceed to the examination of the merits, we will dispose of a question presented by the assignment of errors, growing out of the order changing the venue of the case.

When the venue in a cause has been changed to a county where one of the parties resides, the Court may remand, but cannot send it to any other county than that from which it was removed.

The cause was removed from the Fleming to the Mason Circuit Court, upon the petition of John Wallace, one of the defendants. The order for removal was made by the Judge of the latter Court, to whom it was known, but the fact did not occur to him at the time, that Wallace resided in the county of Mason. The relator, upon that ground, in due time after the removal of the cause, moved the Court to send it to some other county. The Court offered to remand it to Fleming, but to this the relator objected, and thereupon the Court, upon the ground that he had no authority to send it elsewhere, overruled the motion, and we think correctly. The Court might,

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ATTORNEY GENERAL vs WALLACE'S DEV.

and ought upon motion, to have remanded the cause to Fleming, but had no authority, under the circumstances, to send it to any other county. The power of the Judge over the case, in virtue of the petition of Wallace, was exhausted when he had made the order for its removal to Mason. If that order was illegal or improper, he could only remand the cause. He had no authority to set aside or change the order. The statute provides that there shall not be more than one removal of the same cause, except under a particular state of case, which did not exist here. The improper removal of the cause to Mason, did not affect the jurisdiction of the Court; and as there was no motion by the relator to remand it, but an objection to that course, it seems to us that there was no error in regard to the venue, which can be rendered available.

In the further consideration of the case, it becomes important to enquire as to the validity of the devise sought to be enforced, and if valid, whether it can or ought to be enforced by this mode of proceeding.

It is insisted that the devise is void upon two grounds:

1st. That the will vested an absolute, unconditional fee simple estate in the daughter, and consequently that nothing remained to devise over.

2d. That if not void upon that ground, the devise is void for want of certainty.

The objection, in our opinion, is not available upon either ground.

Although the will is rather unskilfully drawn, and in some particulars somewhat ambiguous, yet there is little difficulty, we think, in ascertaining the testator's intention, the governing and controlling consideration in the construction of wills.

It is very evident he intended that his estate, with the exception of specific legacies and his slaves, should go to his daughter and her issue, if any, living at her death, and upon the failure of such issue, that it should go to the other persons and purposes named in the will. It is true he says he gives it to his daughter to be entailed upon her and her child or children, but that did not, as contended, constitute an estate tail. The law allowed him to secure it to his daughter and her child or children, or

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issue living at her death, and upon the failure of such issue, otherwise to direct and control the disposition of it. This, we think, he designed to do and has done by his will, and it is by no means clear that he intended the devises over should take effect upon any other contingency than his daughter dying without issue living at the time.

The portion of the will upon which the devises over mainly depend, is as follows: "but in the event of the death of my above named daughter, Amelia Sarah Wallace, without child or children, or should she not have any child alive at her death, or should her child or children die without issue, in either event I do will and bequeath all or the whole of my estate that my daughter may own at their death, without issue as above stated, &c."

By the expression "in either event," the testator must have intended that there was more than one event or contingency, upon which the devises over were to take effect, what then were those contingencies? It is evident, we think, the first was the death of his daughter without having had a child or children. He certainly could not have intended the clause, "or should she not have any child alive at her death," *alone* to constitute a second contingency, for that would cut off the grand children of his daughter, if any, which cannot be presumed to have been his intention. That clause must, therefore, to ascertain a second contingency, be construed in connection with the one that follows, "or should her child or children die without issue." The first clause would seem to imply that his daughter might have a child or children, but who might not be alive at her death, and by the last clause, that such child or children should die without issue. *The dying without issue* then would be confined to the children of the daughter, who might die before and not be alive at her death. Upon any other construction, it seems difficult to give any consistent meaning to the clause, "or should she not have any child alive at her death." It would follow from this view, that it was the intention of the testator that although his daughter should have a child or children, yet if they should not be alive

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ATTORNEY GENERAL vs WALLACE'S DEV.

at her death, and should die without issue, his estate was to go over as directed. If correct in this construction, it would also follow that there was virtually but one contingency upon which the devises over depended, and that was the death of the daughter without issue living at the time. That was a contingency which must happen, if at all, within a life in being. The daughter may be considered as taking an estate in fee, which was to terminate, however, and did terminate upon the happening of that contingency.

In this view the limitation over was good as an executory devise, according to the well settled doctrine both in England and this country: (*Fearne on Remainders*, 399;) *Hart* vs *Thompson's administrator and heirs*, (3 *B. Monroe*, 482,) and authorities there cited.

The testator devised estate to his daughter, with a limitation over to others if she should die without leaving any child alive at her death.—Held that the limitation was good as an executory devise: (*Fearne on Rem.* 399; 3 *B. Monroe* 482, and authorities there cited.) But if the devise be to the daughter, and over in case she die leaving issue living at her death, provided they should die without issue, the last would be void, as too remote. It might not happen during the life of one in being, and 21 years thereafter.

But if we are mistaken as to the intention of the testator in regard to what should constitute the second contingency, still we think the limitation over is good. We are satisfied that the will authorizes the construction that he intended his estate to go over should his daughter die without having had a child or children, or in other words, without issue living at her death. The devise to take effect upon that contingency, we have seen, is clearly good. But if he intended to provide that the devises over were still to take effect, although his daughter should die leaving children, provided they should die without issue, it is equally clear the devise upon that contingency, would be void. It might not happen within a life in being and twenty one years thereafter, and would be equivalent to an indefinite failure of issue. But the attempt to create a limitation upon a contingency, which the law did not allow, ought not to destroy or affect it, upon a previous contingency which the law does tolerate.

Whether the daughter should be considered as taking an estate for life only, or an estate in fee, defeasible upon a failure of issue at her death, upon either construction the devises over, we think, can be sustained. In the first instance, her issue, if any, living at her death, would take an estate in fee by implication under the will, as purchasers. In the second, the estate would pass in fee to such issue, if any, by descent; and in each instance,

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upon the failure of such issue, the devises over would take effect. So that in any view of the case, the devises over are good.

Wills should be so construed as to carry out the intention of the testator so far as consistent with the rules of law. If all its provisions cannot be sustained, it should be carried into effect so far as it can be sustained.

The rule is well settled, that wills should be so construed as to carry out the testator's intention so far as may be consistent with the rules of law: and if the entire will, or all its provisions cannot be sustained, still to sustain and carry it out as far as may be practicable.

Having thus disposed of the first, we will now examine the second objection to the devise in question.

A devise to be applied to the dissemination of the Gospel at home and abroad is valid, not void for uncertainty. The trustees should first decide the best mode of its appropriation.

The object of the charity is "the dissemination of the gospel at home and abroad," and is deemed sufficiently certain and specific; gospel, according to the common and more general acceptation of the term, is synonymous with christianity or the christian religion. The general mode of accomplishing his benevolent purpose is pointed out by the testator. He desires it to be done through the instrumentality of "such charitable and benevolent institutions as *may appear* most useful and efficient for effecting the object. The particular mode of administering the charity or the selection of the institutions most useful for that purpose, it was the intention of the testator, we think, to leave in the discretion of his trustees. That this devise, as a devise in charity, is good and clearly within the statute of the 43d Elizabeth, C. 4, of charitable uses, (1 *Stat. Law*, 308,) according to the construction which has been given to it in England and America, there can, we apprehend, be no doubt. In *Gass & Banta* vs *Wilhite, &c.* (2 *Dana*, 170;) *Moore's heirs* vs *Moore's devisees and executors*, (4 *Dana*, 354,) and other cases, that statute has been held to be in force in Kentucky. The subject of charitable devises in view of it, and the jurisdiction and power of Courts of equity to enforce them, have been repeatedly and elaborately examined by the Chancellors in England and the most eminent jurists in this country. In *Story's Equity, chapter on charities*, 489, the whole subject is examined and all the authorities referred to. In *Moggeridge* vs *Thackwell*, (7 *Vesey*, 36,) all the authorities were examined by Lord Eldon. In that case the testatrix gave to James Vaston the residue of her estate, desiring him to dispose

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ATTORNEY GENERAL vs WALLACE'S DEV.

of the same in such charities as he shall think fit, recommending poor clergymen, &c. The trustee died in the life of the testatrix; the devise was, nevertheless, sustained and administered under a *scheme*: *Greive* vs *Case*, (4 *Br. Ch. C.* 67,) bequest of money to support preachers, held within the statute. *Mills* vs *Farmer*, (1 *Merivale*, 55,) a devise for promoting the gospel in foreign parts and in England, sustained. The subject has also been elaborately examined by this Court, and more particularly in *Moore's heirs* vs *Moore's devisees*, *supra*. and in *Curling's administrator*, *&c.* vs *Curling's heirs*, (8 *Dana*, 38.)

In the former case a devise for the education of poor orphans for the county to be selected by the County Court, was sustained. In the latter, a devise for the use, privilege and benefit of a public seminary, sustained, and given to a seminary established in the county of the testator's residence, after his death.

These authorities, with numerous others that might be cited, fully sustain our conclusion that this devise is valid under the statute of Elizabeth, and enforcible in a Court of equity.

But it is objected that the Court below had no jurisdiction to enforce it by this mode of proceeding.

If the trustees fail to accept and execute a charity trust, the Chan., at the instance of the Attorney General, has jurisdiction to appoint a trustee, and carry the devise into effect, in analogy to the practice in England for near two centuries.

It is very evident from the authorities referred to, that this would have been the appropriate remedy or mode of proceeding in England, upon the failure of the trustees as here alledged, to accept and execute the trust.

The proceeding by information or bill in chancery in the name of the Attorney General, for establishing charities, has been in practice in England for more than two centuries, and the better opinion, in view of the authorities, seems to be, that so far as the Court or Chancellor acts *judicially* and not prerogatively as the representative of the King, the practice commenced and owes its origin to the statute of Elizabeth. If then the proceeding rests upon that statute, which is held to be law in Kentucky, no sufficient reason is perceived why it should not be tolerated; and such was the opinion of this Court in *Chambers* vs *Baptist Education Society*, (1 *B. Monroe*, 215.) It is true that the duties of the Attorney General in Ken-

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tucky, are prescribed and regulated by law, and that it is not made his duty to file a bill like the one now before us. But we cannot admit, as insisted, that because it is not made his duty to institute the proceeding, that therefore, it would be unauthorized or illegal.

It is merely as to the mode of proceeding that his name is used. It imposes upon him no duty and he incurs thereby no responsibility. It is a part of the proceeding that there must be a responsible relator, who is liable for costs and upon whom devolves the preparation and management of the cause. And hence the Attorney General has no right to dismiss a suit of this kind, and more especially when commenced by his sanction. He was, therefore, right in withdrawing or modifying his order for the dismissal of this suit, and leaving the disposition of it to the Chancellor.

It is proper that some responsible person be named as relator who will be responsible for the costs, and who should have the control of the cause, its preparation and management independently of the power of the Attorney General.

Assuming then that the allegations in the bill were sufficient to give the Court below jurisdiction, the enquiry is, whether the decree is right in view of the facts of the case.

The will was admitted to record in June, 1841. The complainant's bill was filed in December, 1843. Process was served upon the trustees, Hodge and Andrews, in January and March, 1844. The other trustees, Todd and Chambers, were proceeded against as non-residents. Neither of them answered till April, 1845, when the answer of Hodge, Todd and Chambers was filed. They state that they had at first been disinclined to accept the trust, and had so expressed themselves, but had afterwards concluded to accept it. That in a suit brought by Dobbins and wife in the same Court, claiming a legacy under the will, they had been made defendants, and in a cross answer in that suit, had signified their acceptance of the trust and asserted their claim to the devise in charity. That suit was commenced in August, 1843, but no process appears to have been served upon either of these trustees, and no answer filed by either of them until after the service of process in this case. The other trustee, Andrews, seems not to have determined to unite in the execution of the trust, till about two years after this bill

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ATTORNEY GENERAL *vs* WALLACE'S DEV.

was filed, when he filed his answer in this and also *in* the suit of Dobbins.

It appears that shortly before this suit was commenced, Hodge consulted counsel upon the subject of this devise, and indicated a disposition to undertake the trust reposed by the will. He was advised to ascertain whether the other trustees would unite with him. Todd, it seems, agreed to join in the execution of the trust; Chambers was disinclined, but consented to the use of his name; Andrews did not consent, so far as appears, till he filed his answer. This information was obtained by Hodge, and counsel employed to assert the claim of the trustees about the time this suit was instituted. Up to about that time, nearly three years after the probate of the will, they had all been disinclined to make an effort to enforce the devise, and no legal step had then been taken. Under such circumstances, we are very clearly of opinion, that there was good ground for filing this information. But as all the trustees have become willing to execute the trust, and claim the right to administer the charity, it is contended that the Chancellor was right in dismissing this proceeding, and leaving the trustees to assert their claims upon their cross bill in the case of Dobbins, and otherwise. On the other hand, it is insisted that the Chancellor should have proceeded in this suit to carry out the devise under a *scheme*.

When there is a devise in charity, and the mode of its application left in the discretion of trustees appointed by the will, the Chancellor will not interfere merely to control the discretion of the trustees, and of administering the charity thro' a scheme of his own devising, unless there be some failure, abuse or evidence of incapacity to carry out the trust.

According to our construction of the will, it was the intention of the testator to leave the administration of this fund in the discretion of his "trusty friends," the trustees. He designates the object, the spread of the Gospel, and suggests the accomplishment of it through the instrumentality of such benevolent institutions *as may appear*, as we think, to his trustees, most useful for that purpose. He moreover vests the trustees with the necessary powers to hold and *dispose* of his estate agreeably to the provisions of his will. A Court of equity in such a case, will not interfere, for the purpose merely of controlling the discretion of the trustees, and of administering the charity through a *scheme* to be devised by the Court. This would in effect be making a will for the testator. But in such cases the Court will only interfere

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when there is some failure or incapacity on the part of the trustees to act, or where there has been some abuse of the trust.

—In which case the Chancellor will assume the execution of the trust in the place of the trustees.

In that case the Chancellor would, and by this mode of proceeding, interfere, and virtually assume and execute the trust in the place of the trustees. This doctrine, we think, is sustained by the authorities already cited.

But where the trustees unreasonably delayed the commencement of the duty of carrying out the trust, and a bill was filed.—Held that though the trustees, by their answer expressed their willingness and intention to enter upon and carry out the trust, that it was proper for the Chancellor to retain control of the case, and require the trustees to report a scheme of carrying out the devise, that the devise might be effectuated speedily, and in accordance with the intent of the testator.

But here the trustees are able, and now willing to act, and claim the right to administer the fund. It is true, they came to this determination after a delay rather unreasonable. Still we are of opinion they should be permitted to execute the trust. But as there was sufficient ground at the time for instituting this proceeding, as two of the trustees are non-residents, and became so since the date of the will, and probably since the death of the testator—as a third is insolvent, and probably became so since the testator's death, in view of these facts, and also of the previous indifference, neglect and unwillingness of the trustees to accept the trust, we think the Court should have retained the cause, and have ruled them to assign or report a plan or *scheme* for administering the fund, not for the purpose of controlling their discretion, unless in flagrant violation of the object and design of the testator, but with a view to the due and speedy execution of the trust. Upon the failure of the trustees so to report, and to proceed in good faith to execute the trust, the Court should enforce it by a *scheme*.

As to the controversy with Marshall, in regard to the Roper property, the complainant's bill should be dismissed without prejudice, that the trustees may, by separate proceedings, assert their claim in reference to it. Other matters of controversy that may arise in regard to the estate of the testator, should not be brought into this cause, except in case of failure, neglect or abuse of the trust on the part of the trustees, the object of retaining it being to secure a due execution of the trust under the supervision of the Court. And for this purpose, the Court will have power, from time to time, to make all necessary and appropriate orders. The trustees will proceed upon their cross bill, in the case of Dobbins, and

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ATTORNEY GENERAL vs WALLACE'S DEV.

otherwise as may be necessary to assert their claim, and obtain possession of the devised estate.

The Court should provide for the payment of all costs necessarily incurred by the relator in this proceeding, and also a reasonable compensation for his services, to be paid by the trustees out of the trust fund.

When real estate is devised to be appropriated to a charitable use, the trustees, whose duty it is to carry out the devise, have the power to sell, that also includes the power to compromise contests which threaten to be protracted and expensive, under the sanction of the Chancellor.

As the question may also arise as to the power of the trustees to convert the real estate, to which they may be entitled under the devise, into money, it may be proper here to remark, that we think they have the power, under the will, and under the supervision of the Chancellor, should exercise it with a view to carrying out more effectually the designs of the testator.

It seems that propositions for a compromise of the numerous controversies between the trustees, devisees, heirs, and others claiming the estate, for the purpose of preventing expensive, and protracted litigation, have been suggested, and a desire has been expressed that this Court should indicate an opinion as to the power of the trustees in that respect. We can only say, that having, as we think, the power to sell, they might also under the sanction of the Court, amicably adjust their claims in regard to this devise, by a compromise.

As all the parties are before the Court, it may be also proper to dispose of another question, arising upon the construction of the will.

When a devise is made to two or more as tenants in common, and one die, or there be a revocation as to one, the share of such one will not survive.

The devise over of one fourth of the testator's estate, subject, &c. to Thomas and Mark Wallace, was afterwards by a codicil, annulled and revoked; and that fourth devised to Fanny Cummings, Edward Cummings, and a *certain female Fanny*, to be equally divided between them. In a subsequent codicil, the testator revoked so much of this devise as gave Edward Cummings one third of the one fourth, and did not otherwise in express terms dispose of it. The question is, whether upon the revocation of the devise to Edward Cummings, that interest survived to Fanny Cummings and the certain female Fanny, or whether as to *that* the testator died intestate. As the devise of the one fourth to Fanny and Edward Cummings and *the female Fanny* was to be equally divided between them, it was a devise to them

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as tenants in common, and not as joint tenants, and in such cases the rule is, that upon the death of one of the devisees before the testator, or the revocation as to one, the share of that one, will not survive to the other: *Creswell* vs *Cheslyn*, (2 *Eden*. 123; 2 *Williams on Executors*, 763.) It results, therefore, that as to the one twelfth of his estate, after the payment of debts and pecuniary legacies, the testator died intestate.

Wherefore, the decree is reversed and the cause remanded, with directions to dismiss the complainants bill as to M. P. Marshall, without prejudice, and for further and appropriate proceedings consistent with this opinion.

Cord and Hord for plaintiff; *Robertson, Harlan, T. Y. Payne, Boyd, McClung and Taylor* for defendants.

Danforth *vs* Talbot's Administrator, &c.

CHANCERY.

ERROR TO THE WASHINGTON CIRCUIT.

Case 152.

Wills. Devises. Remainders, vested and contingent.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

October 2.

The will of Cyrus Talbott, the questions presented and decree of the Circuit Court.

By the will of Cyrus Talbot, admitted to record in September, 1833, the testator, intimating clearly the intention to dispose of his entire estate, devised to Paul I. Booker all the estate he might die possessed of, in trust and to be subject to the dispositions made in the will, as follows: By article 2, $5,000 or one fourth part of the money, &c., to be invested in stock, &c., and the interest as it accrues, to be paid to testator's daughter, Ann Richmond, during life, and then at her death to her children; but should she not intermarry and have issue, then at her decease, the principal shall descend to the surviving issue of her brother and sisters, in proportion to numbers. 3. Five thousand dollars or one equal fourth, &c. I give and bequeath to my son Cyrus, to be invested and regulated as in case of my daughter Ann R. by article 2, and the interest on the same as it accrues, to be paid for his education and support, when should he arrive at twenty five years of age, the principal is to be paid over to him. By the 4th and 5th articles he makes a bequest of $5,000,

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DANFORTH vs TALBOT'S AD'R.

to be invested in like manner, for the benefit of each of two married daughters, the interest to be paid to the daughter during life, and then the principal to her surviving children.

6th. The farm whereon I live, commonly called Snug Harbour, the lands purchased, &c. &c., together with my household and kitchen furniture, stock, &c. &c., to the use and for the support of my wife Alice, for and during her natural life; the following reservations in favor of my daughter, Ann R. who shall be entitled to a room, &c. &c., so long as she may remain single.

"7th. On the decease of my said wife, the above described farm, &c. &c., shall become the property of my son Cyrus, when arrived at the age of twenty six years, (excepting the reservation in favor of Ann R.;) but after providing for the support and comfort of his mother, he may be entitled to all the profits arising from the same, except the reserved rights of his sister, Ann R."

The succeeding clauses dispose of his slaves to his wife during life or widowhood, to be divided at her decease, among the testator's children, deducting advancements in slaves, and after stating certain advances in money to be deducted from the respective portions on account of which they were made, the will appoints P. I. Booker executor, who renounced the executorship but was qualified as administrator with the will annexed.

It appears that the testator's widow survived him but two or three years, that the daughter Ann R. intermarried with Danforth, and that Cyrus Talbot, the son, having been let into the possession of the farm called the Snug Harbour, sold the same after he had attained the age of twenty one years, to Danforth, for the sum of $6,488, and executed his bond for conveyance of the title, and that he afterwards died unmarried, before he attained the age of twenty six years. This bill was subsequently filed by Danforth, (his wife uniting with him,) for the purpose of obtaining a conveyance of the land sold to him by Cyrus Talbot, the devisee. The trustee appointed by the will of Cyrus Talbot the elder, and the personal and real representatives of each of the Talbots, were made defendants. And the Court, on hearing the cause, having

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dismissed Danforth's bill, the sole question presented for our consideration is, whether under the will which has been set out, Cyrus Talbot the younger, having died under the age of twenty six years, had a vested fee simple in the land, or whether his arrival at that age was a condition precedent to the vesting of the estate.

In the construction of wills the great object is to arrive at the intention of the testator. The language used furnishes an appropriate and peculiar means of ascertaining that intention, which language is to be understood according to the interpretation that such terms may have received in judicial determinations on wills, unless the obvious intention should be thereby violated.

This question has been considered both with reference to the evidences of intention to be gathered from the provisions and language of the will, and to the effect which has been given by adjudged cases to particular expressions used by the testator. The great object being to ascertain and effectuate the intention of the testator, his language used for the very purpose of conveying that intention, furnishes of course, the appropriate and peculiar means of ascertaining it. But besides the resort to rules of construction for interpreting the intent of particular words or clauses, the certainty and uniformity which should prevail in the modes of creating estates and in the rules applicable to them, seem to require that when a will is found to use words and phrases ordinarily used in the creation of estates, and which by the course of judicial decisions upon wills, have received an established interpretation and effect, these decisions may not only be resorted to but should be adhered to in their application to the particular case, unless the obvious intention of the testator would be violated by so doing. Such decisions being themselves presumably founded on an ascertainment of the meaning of the particular words or phrases, and of the intention with which they were used, and being directed to the effectuation of that intention, according to the rules of law, become in point of reason as well as of law, legitimate sources of exposition.

The precise question in the case is, whether the testator intended to give Snug Harbour to his son Cyrus, certainly and in all events, or whether he intended to give it only upon the contingency of his living to be twenty six years of age. If the gift was certain, though to take effect in enjoyment at a future period, it vested an immediate interest or estate in remainder, which would have passed to the heirs of the devisee upon his death before the period of enjoyment, and of which he might dispose

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DANFORTH vs TALBOT'S AD'R.

before that period, by will or contract, if competent by the general laws to perform such an act. This is the legal consequence attaching inseparably to such a devise. If the interest or estate vested, the disposition or transmission of it from the devisee, could not have been prevented by the testator's desire or intention on the subject, unless that intention were so expressed as to subject the interest to a condition or limitation by which, in a certain event, it should be defeated, and pass under the will in a differeet direction. The intention of the testator on such a subject, may be wholly ineffectual, either because he has not made sufficient provision for effecting it, or because it is, in view of the law, illegal or inconsistent with the actual provisions of the will.

If as contended, it is fairly deducible from the entire will, that the testator did not intend his son Cyrus to have the power of disposition until, and unless he arrived at the specified age, such intention, if not specifically and properly carried out, could at most, form only one of the considerations to be taken into view in giving construction and effect to the particular devise. If that gives a vested interest, the mere inference of an intention to withhold the power of disposition, can have no operation. Conceding the existence of such an intention, the question would be, what mode did the testator adopt for its effectuation? And as he may have supposed, and probably did suppose that his object in this respect, was secured by the devise of the entire estate to a trustee, although he might give a certain interest to his son, not to be enjoyed in possession until a future time, the assumed intention with respect to the power of disposition is entitled to little if any weight in the interpretation of the devise to the son.

But this assumed intention is found no where unless in the devise of the whole estate to the trustee, and in the reference to the age of the son in the particular devise in question. Nor is it shown by this latter devise, except by construing it to be contingent, which is the very matter in dispute.

Leaving out of view the reservation in favor of the daughter, Ann R., which cannot affect the present ques-

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tion, the whole will, so far as it relates directly to the Snug Harbour farm, presents the case of a devise to a trustee for the following purposes, viz: to the use of testator's wife for life for her support, and on her death it shall become the property of the son Cyrus, when arrived at the age of twenty six years, with the right in the mean time, of taking the profits after or beyond a comfortable support to his mother. It is said that the words "the said farm shall become the property of Cyrus when arrived at the age," &c., amount in effect or are equivalent to saying it shall not become his property until he arrives at that age. But suppose omitting this reference to age, the testator after devising the use of the farm to his wife for life, had said, and when she dies or at her death, it shall become the property of Cyrus. This would clearly have been a postponement of the time of enjoyment only and Cyrus would have had a vested remainder from the time of the testator's death. In that case the words, "shall become the property of," would give a present interest to be enjoyed in possession when the wife should die; and neither those words themselves, nor their connection with the future event of the wife's death, by the adverb "when," would be understood as postponing any thing but the enjoyment. Why then should they have a different meaning when connected with the future event of the devisee's arrival at a particular age? The uncertainty of the event referred to, can only affect what is made to depend upon its happening or not happening, but cannot, in reason; give to the operative words of the devise, a negative import which they would not have if connected with any other event, nor prevent the implication which they would otherwise carry with them of a present interest, to become vested as to enjoyment in future.

And although the event referred to, that is, the arrival of the son at the age of twenty six, must, when abstractly and precisely considered, be regarded as uncertain and contingent, must it be assumed to have been so regarded by the testator? He evidently did not regard it as contingent. He speaks of it as a thing certainly to happen. He does not even say, "if he shall arrive, &c., but when arrived at the age of twenty six years;" and he makes

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DAWPONTH vs TALBOT'S AD'R.

no devise over upon the event not happening, as he would almost certainly have done if he had regarded the happening of the event as uncertain, or its not happening as a contingency which would give a different direction to the estate. It is to be observed too, that the event of the devisee's attaining a particular age, is unlike those events, such as marriage, with regard to which there is an uncertainty, not only as to their ever happening, but also as to the time at which they will happen, if at all. Here the event must happen, if at all, at a fixed period, well known to the testator. And as he seems not to have doubted but that his son would live until that period, and has made no provision for a different event, we should more probably violate his intention and his own understanding of the language used, by regarding it as a contingency than by considering it as he probably did, as fixed and certain.

This distinction is referred to in the case of *Briscoe's devisees* vs *Wickliffe*, (6 *Dana*, 162–3,) where it is said in reference to a devise to A. if or when he attains a certain age, that the law, in ascertaining the intention of the testator, may regard him as looking only to the point of time when the event referred to would certainly happen, if at all, and not to the happening of the event, and that the devise might be construed as referring to a certain time which must come, and thus being uncontingent be effectual to convey an immediate vested interest. The case of *Atkyns* vs *Hiccocks*, (1 *Atkyns*, 501,) not now before us, and (*Fearne on Remainders*, 553–4.) are referred to as sustaining this distinction. The last authority shows that there are cases in which the law considers the event of the legatee's attaining a certain age as fixed, and not contingent; and supposing the principle to be founded on a reference to the testator's intention, it would seem to be as applicable to the case of a devise as to that of a legacy.

But there is still another circumstance in this devise, which is entitled to weight, which is, that Cyrus, the son, is entitled, from his father's death, to so much of the profits of the farm as may remain after yielding a comfortable support to his mother and sister. He might thus

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become, and did in fact, become entitled to all of the profits before his arrival at the age of twenty six; and it is only in reference to the termination of the title and control of the trustee, that the testator uses the peculiar language, the farm "shall become the property of Cyrus when arrived at the age of twenty six years." The profits and use might be entirely his before, but at that time (his mother being dead,) the estate was to be absolutely his, in title and possession. And as it is given to no other person and no disposition made of it in the event which has happened, of his death before the period referred to, we think the clear inference as to the intention of the testator and the import of the clause, is that the farm, subject to the interest of the wife and daughter, is devised to the son Cyrus, postponing the full and absolute enjoyment until the death of his mother and his arrival at the age specified.

The testator devised the farm on which he lived, &c. household and kitchen furniture, stock, &c. to the use and for the support of his wife Alice, for and during her natural life—his daughter R. to be entitled to a room, &c. so long as she remains single.—On the decease of his wife, the farm, &c. to become the property of his son Cyrus, when arrived at the age of 26 years; but after providing for the support of his mother, Cyrus entitled to all the profits arising from the farm, except the right reserved to R. Held that Cyrus had a vested right at the death of his father, in the profits as well as land of which he could dispose after the

The construction that the testator intended to give to Cyrus the entire fee simple in this land, subject only to the particular interests carved out of it, is supported not only by the fair import of the clauses relating particularly to it, but also by a view of the entire will, and a comparison of its provisions: 1st. The testator intended to dispose of his entire estate, and evidently believed he had done so by this will. But this is only done upon the supposition that he gave and intended to give the farm to Cyrus unconditionally. 2d. In giving the pecuniary or stock legacies to his daughters, he follows them up in each case until the death of the daughters, and then disposes of them finally. But in the similar legacy to Cyrus, he only attempts to control it up to the time when Cyrus attains the age of twenty five years. And although in directing the payment to be made, the will uses the expression "when should he arrive at twenty five years of age," &c., and the phrase imports a condition more certainly than one is imported in the devise of the farm. Yet as the legacy is first given in positive terms, and this apparent condition relates only to the time of payment, the legacy was unquestionably vested. And the case is precisely the one described by Fearne, 553-4, where the time at which the legacy is payable, depends for its hap-

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DANFORTH vs TALBOT'S AD'R.

age of 21—not a contingent estate depending on his arriving at the age of 26 years.

pening, "on an event which the law for this purpose considers certain and fixed, as the legatees attaining a certain age." Then this intention in favor of Cyrus being ascertained with respect to the legacy, why should not the words indicating the time when the farm is to become his property, being less calculated to express an uncertain contingency be construed as referring to an event fixed and certain in the consideration of the law as it was in that of the testator. 3d. From the care with which the testator controls the pecuniary legacies to his daughters up to the time of their deaths, and then disposes of them, it may be assumed that if he intended the devise of Snug Harbor to Cyrus, to be dependent upon a condition which might fail by his early death, he would not have left the estate to fall to his daughters without control, but would have secured it to them for life, and their children afterwards, as in case of the legacies in the event of the death of Cyrus without children. And 4th. If the devise is contingent, to take effect only in the event of Cyrus living to be twenty six years of age, the consequence would be, that his children, had he left any at his decease, would not have inherited the land from him, but would only have had an interest of one fourth as heirs of the testator. A consequence which we cannot presume to have been intended, but which we must suppose would have been provided for if the devise to Cyrus had been intended to be contingent, as the means of preventing a rash or premature disposition of the estate by him.

Passing from the considerations arising on the face of the will, we find the adjudged cases fully sustaining the construction and effect which we have given to the devise in question. In addition to the cases in which, after a devise to one if or when he shall attain a certain age, there was a devise over if or in case he shall die before attaining that age, and in which the condition has been adjudged to be a subsequent one, by which the estate would be defeated and pass over, and not a precedent one, to happen before the estate would vest under the devise, to which alone, with one exception, the attention of the Court seems to have been drawn, in the case of *Briscoe's*

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devisees vs *Wickliffe*, (6 *Dana*, 162,) we find a train of decisions, in which, although there was no such devise over, the first devise in similar words has been held to be absolute and not contingent, and to give a vested interest. The cases in which there is a devise over, are *Edwards* vs *Hammond*, (3 *Leigh*, 132;) *Stocher* vs *Edwards*, (2 *Shower*, 398;) *Doe, on dem. Hunter* vs *Moore*, (14 *East*, 603-4;) and *Broomfield* vs *Crowder*, (1 *N. Rep.* 4 *Bos. and Pul.*, 313.) In the case of *Briscoe's devisees* vs *Wickliffe*, (6 *Dana*,) it seems to have been inferred, from these cases, that the rule or inference that the devise was not contingent, but vested an immediate interest, was to some extent dependent upon there being a devise over, on failure of the condition. But upon further investigation, we are satisfied that the principle to be deduced from all the cases, is that the apparent condition or contingency in the first devise, is held not be a condition, but only a designation of the time when the remainder is to vest in possession, and that the failure of the event referred to in the first devise being made the condition of the devise over, thus becomes with respect to the first devise a condition subsequent. So that if there is no devise over, there is no condition either precedent or subsequent annexed to the first devise. The cases of both the classes above mentioned, are collected in (*Fearne on Remainders*, 242 *to* 246,) as illustrative of the principle that a remainder is sometimes limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them; or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession. Of the cases in which there was in substance a devise to one if, or when, he shall arrive at a particular age, and no devise over if he did not reach that age, the first is *Boraston's case*, (3 *Co. R.* 19,) where the devise was to A. and B. for eight years, remainder to testator's executors until such time as H. should accomplish his age of twenty one years, and when the said H. should come to his age of twenty one years, then the testator willed that H. should enjoy the lands to him and his heirs forever. It was decided to be nothing more

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DANFORTH vs TALBOT'S AD'R.

than a devise to the executors until H. attained the age, &c., remainder to H. in fee, and that the adverbs of time when and then, do not make a condition precedent. The cases of *Mansfield* vs *Dugard*, (1 *Eq. Ab.* 195;) *Goodtitle* vs *Hayward*, (1 *Burrows*, 228,) *and Doe dem. Wheedon* vs *Lee*, (3 *Durn. and East*, 41,) are in substance the same. It is remarked in a note to *Fearne, page* 242, that in all of them there was some intermediate devise or disposition of the estate, or the rents and profits either to a stranger or for the devisee's own benefit, till the time at which the devisee was to take the estate; and that the cases appear to have been determined upon that circumstance. And it is intimated as the opinion of Mr. Fearne, that a simple devise "to B. and his heirs and assigns forever, when he arrived to the age of twenty one years," would not be good. But even if this be so, the decisive circumstance referred to is present in this case, the entire intermediate profits being devised to the wife, the daughter and the principal devisee himself. Some of the cases last cited, to which we add *St. White* vs *St. White*, (1 *Black. Rep.* 519,) and *Doe* vs *Norvell*, (1 *Maul. & Selw.*, 334,) are scarcely distinguishable in any important circumstance, from the one now before us. But it is deemed unnecessary to protract this opinion by further detail.

Upon the whole, we are satisfied that Cyrus Talbot the devisee, took a vested estate in remainder by the devise, which he had a right to sell at any time after he became twenty one years of age, and consequently that his contract with Danforth was effectual to bind the title as derived from Cyrus Talbot the elder, and that upon the merits as now appearing, a conveyance should have been decreed accordingly, if the suit had been in proper state of preparation for final hearing.

But the personal representative of Cyrus Talbot, the devisee, was a necessary party to contest the payment of the purchase money, and his devisees might not be improper parties.

Wherefore, because of the defect of parties, the decree dismissing the bill absolutely, is reversed, and the cause is remanded, with directions to allow the complainants

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to bring the proper parties before the Court, and for further proceedings and decree consistent with this opinion.

STRADER, &c. vs GRAHAM.

C. A. Wickliffe for plaintiff; *Morehead & Reed and Loughborough* for defendants.

Strader, &c, *vs* Graham.

CHANCERY.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Case 153.

Depositions. Slaves. Steam boats.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

October 4.

THE facts of this case are sufficiently stated in the opinion rendered when it was formerly in this Court, and reported in 5 *B. Monroe*, 173. In that opinion the principles applicable to the whole case as then appearing, were carefully considered and fully stated. The case now presents essentially the same facts, and must be governed by the same principles. A few questions, however, made on the trial after the return of the cause to the Louisville Chancery Court, were not presented when the case was formerly here. We shall proceed briefly to notice such of these as require comment.

Depositions having been taken before all the proper parties were before the Court, were retaken after the proper parties were made, in which the defendants refer to & affirm their first depositions. Held that the first depositions might properly be read in connection with the first.

1. Armstrong, the master of the boat at the time of the alledged asportation of Graham's slaves, having been made a party as directed by this Court, there was a general order for re-taking depositions. In some few of the depositions then re-taken, the witnesses referred to their former depositions, affirming that the statements therein were true, and adopting them as their present deposition, most of which statements were also in substance, reiterated in the second deposition. The Court allowed the former depositions thus referred to, to be read as evidence against the objection of Armstrong, and the propriety of so doing is now made a question. We are of opinion that as Armstrong had, in these cases, the right and the opportunity of cross examining the witness as to all the statements contained in the deposition referred to, such depositions were properly admitted as evidence against him, and that he was not prejudiced thereby.

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STRADER, &C. vs GRAHAM.

The deposition of an obligor in a bond given for the performance of a decree or attaching of a steam boat, or the part owner of such boat in like case, is incompetent evidence for defendants.

2. The other defendants besides Armstrong, offered his deposition, taken before he was made a party, as evidence in their favor, but being objected to, it was rejected. The same deposition had been suppressed by the Chancellor before the first trial, on the ground that Armstrong had executed the bond by which the boat had been replevied. Upon which this Court, in the former opinion, remarked that "the deposition of Armstrong not having been objected to, should not have been rejected." The implication is, that if objected to, it should have been rejected. But considering the question as an open one, we are of opinion that the deposition was inadmissible, even if Armstrong had not been made a party, not only because being bound for the performance of the decree, he was interested in the result, but also because the bill sought to make the defendants, the owners of the boat, liable by subjecting the boat to sale for damages arising from the misconduct or neglect of Armstrong as their agent. If he improperly permitted the slaves to go on board and the owners of the boat were thereby subjected to a decree for damages, he was liable to them for the loss which his act or neglect occasioned, and the decree would be evidence against him of the fact and amount of recovery. If there should be no decree, there would be no loss to them, and no consequent liability on his part. Under these circumstances, the question being as to the misconduct or neglect of the agent, he is an incompetent witness for his principals: *Railroad Company* vs *Kidd*, (7 *Dana*, 251; 3 *Starkie on Evidence*, 1231-2; 1 *Greenleaf's Evidence*, 461-2.) Moreover, Armstrong was directed to be made a defendant, presumably on the ground of interest, and whatever interest he had was not acquired after his deposition had been taken, but existed at the time. The question, therefore, does not depend upon the effect of an after acquired interest, but he was interested, and therefore, incompetent at the time; and his deposition was properly rejected.

3. Every question made on the last trial by instructions asked or given or refused, had been made on the first trial, and being presented by the record as formerly before us, was decided either expressly or in effect by the

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former opinion. With regard to the criterion of damages particularly, and to the liberties which had been allowed to the slaves, and to the effect of their transient visits to Ohio and Indiana, the former opinion was explicit and its principles were strictly observed by the Chancellor on the last trial.

The former opinion in this case does not concede that if the owner take his slave to a State where slavery is not tolerated, or permit it to be done but for a transient purpose only, that the slave thereby becomes free; but upon returning he becomes again a slave, on the contrary, clearly and repeatedly stated that such a consequence from such a fact was not admitted.

There is, therefore, no room for further question in this Court upon this part of the case. Having seen, however, that in another case so much of the opinion formerly rendered in this case as discusses the effect of a transient visit made by master and slave to a State in which slavery is prohibited by the fundamental law, has been supposed to involve the principle or inference, (so far at least as the opinion of the writer was concerned,) that the slave though once free by reason of such visit, becomes a slave again by a voluntary return to Kentucky, we take this opportunity of relieving the opinion from such a misconstruction. The opinion contains no concession either express or implied, that the slaves in question were ever free, or could properly have become so by being temporarily in a free State with their master or other citizen of this State, having control over them. On the contrary, it is clearly and repeatedly stated, that the Court does not admit that in consequence of such a fact, and by force of the mere general prohibition of slavery in the fundamental or declaratory law of the State, which might be thus visited, the relation of master and slave, as existing under the laws of their own State, would be affected. And a question is made even as to the effect to be given here, to the decision of a tribunal in the free State, which upon the appeal of the slave there, should have declared him free.

It is true, the fact that the slaves had voluntarily returned with their master or his representative, was considered of some importance, not as affecting the general question of the effect of the foreign law, but rather as excluding that question from this case, or at least of conclusively relieving the case from the operation of that law. And it was deemed material in a case of this character, that even those jurists who maintained that by an appeal to the foreign law, while within its jurisdiction,

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THARP, &c. vs COTTON'S EX'S.

the slave, though taken there with his master for a temporary purpose, may obtain the benefit of that law, concede that if he voluntarily return with his master to his own country, without such appeal, he is still a slave by its laws.

It is to be observed too, that in this case, the law could be judicially pronounced only in reference to the facts of the case of which the voluntary return of the slaves was one. And if any discrimination should be made in the consideration of that opinion, whereby one portion or principle should be ascribed to the Judge who wrote it, rather than to the Court, (for which, however, there was no ground in that case,) it would seem more reasonable to ascribe to the Court the decision of the very question presented by the case, including all its facts, and to the Judge who wrote the opinion the reason given in support of it, or any general discussion relating to it.

Perceiving no error in the present record to the prejudice of the appellants, the decree is affirmed.

Duncan for appellants; *Robertson, Harlan and Pirtle* for appellee.

CHANCERY. *Case* 154.

Tharp and Burke *vs* Cotton's Ex'rs., &c.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Bills of review. Consolidating suits. Decrees. Parties in Chancery.

October 4. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

6 *B. Monroe*, 6, referred to for the facts of the case.

THE first decree rendered in this case, and which was before this Court at the fall term, 1845, (6 *B. Monroe*, 6,) declared expressly that the two debts due from the administrators of Felts to Cotton's executors, had the first and prior lien upon the mortgaged property, (in both mortgages ;) that the debt to Tharp was next in precedence, and that to Burke last. This Court in its opinion then rendered, does not pronounce that disposition erroneous, but merely says, "The mortgage debts thus reduced, (that is by the credits directed,) have respective-

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ly, the first lien on the property mortgaged. Tharp having filed his bill first will be entitled to precedence over Burke." This language though it implies affirmatively that each mortgage debt has the first lien upon the property on which it is secured, does not imply that either of them is in any event to be postponed to the debts of Tharp and Burke. Nor can it be assumed, that in directing the remnant of the Norton debt in the hands of Cotton's executors, to be applied first as a credit to the first mortgage debt, and then as a credit to the second, this Court intended to subject the executors to loss in case the second mortgage should prove insufficient to satisfy the debt secured by it. On the contrary, by directing the application of the Norton debt first to the payment of the note of $978, for which there was no security, it is clearly shown that the Court did not intend to take this disposable fund out of the hands of the executors, leaving any part of their just claims unsatisfied. The contingency of the insufficiency of the second mortgage to satisfy the debt therein secured, was not contemplated; and the direction as to the application of the Norton debt to the two mortgage debts in the order of seniority, was evidently made in view only, of the fitness of that mode, in the absence of every other circumstance which might control it. Whether upon principle, a mortgagee having two distinct mortgages, each securing a separate debt upon separate property, and having before any other creditor intervened, brought a separate suit for the foreclosure of each mortgage, would upon the consolidation of these suits with those of subsequent attaching creditors of the mortgagor, be entitled to a decree appropriating any excess which might arise in selling under one mortgage to make up the deficiency in the other before the attaching creditors would be entitled to any thing, need not be now considered. It was in effect so decided in the first decree. This principle of the decree does not appear to have been relied on in this Court as an error, and was certainly not made the ground of reversal. Neither was it so expressly disapproved or contradicted by the former opinion, that in remanding the cause for proceedings conformable to that opinion, the mandate

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THARP, &c. vs COTTON'S EX'S.

should necessarily be understood as requiring a departure from this principle, and especially with the effect of violating the recognized equity of Cotton's executors to apply the Norton debt to such of their own demands as were not secured. The first decree of the Chancellor had left certain rents received by the mortgagee from the mortgaged premises to be applied to the credit of the unsecured note of $978, and had allowed the executors of the mortgagee to retain the Norton debt as their own. And for these errors alone, the decree was reversed, and the cause remanded for further proceedings and decree in conformity with the opinion of this Court. Before the return of the cause to the Court below, the property had been sold under the first decree, which was not suspended; and on its appearing that the proceeds of the property in the second mortgage were insufficient to pay the debt secured by that mortgage, but that the proceeds of the property in the first mortgage added to the remnant of the Norton debt, produced an excess beyond the first mortgage debt more than sufficient to pay both debts, (which result would also be produced by applying the Norton debt first to make up the deficiency in the first mortgage, and then to make up the deficiency in the second mortgage,) the Chancellor decreed the satisfaction of both debts out of the aggregate fund, before applying any part of it to the claims of Tharp and Burke. The consequence of which is, that about one half of Tharp's claim is left unsatisfied, and Burke gets nothing, when by applying the Norton debt to the first mortgage debt only, and considering the excess arising from that mortgage thus relieved, as subject to the attachments before it could be applied in aid of the second mortgage, Tharp's debt would be fully satisfied, and a small sum paid on that of Burke; but Cotton's executors holding the two mortgages, and also the Norton debt, more than sufficient for the entire satisfaction of all their claims, would lose about one half of their second mortgage debt.

The decree as rendered, conforms to the equitable principle applicable to the case, and which was impliedly recognised in the former opinion, and as in effect it only carries out the precedency of the mortgage debts

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as established by the first decree, which whether erroneous or not, as therein declared, was not expressly overruled nor particularly animadverted on by this Court, we cannot say that it so far violates either the mandate of this Court, or the principles of the opinion to which it refers, as to require or authorize a reversal on that ground.

The record presents also an attempt on the part of Burke to renew, after the return of the cause to the Court below, the contest for precedency with Tharp, in the appropriation of the fund remaining applicable to one or both of their claims. This was attempted by filing a bill of review, alledging first, that Tharp, on account of certain defects in his proceedings, had acquired no lien. Secondly, that under the act of 1839, regulating the administration of estates, (3 *Stat. Law*, 240,) the assets of Feltz should be distributed ratably among his general creditors. And third, that since the rendition of the first decree, and while the case was in this Court, the complainant had discovered that the demand of Tharp, (which he held as endorsee of a sight bill of exchange, accepted by Feltz, under date of New Orleans,) was founded wholly on a gaming consideration, and that he had not known until after the case was in this Court, either the fact itself or the means of proving it. This bill was answered by Tharp, who denied the alledged discovery, professed his own ignorance of the facts alledged as to the consideration of his demand, and claimed to be an innocent holder for value, &c. He also alledged that the administrator of Feltz had set up the same fact as to the gaming consideration, in answer to his, (Tharp's) bill, and taken proof, and that this question and the others made by the bill of review, was decided by the decree of the Chancellor and of this Court. He relied upon these decrees as a bar, and also demurred to the bill of review. Proof was taken by Tharp which leaves no doubt that the bill was accepted by Feltz, solely in consideration of money lost at gaming in the State of Ohio, and that by a statute of that State which was proved by copy though not referred to in the bill, the transaction was condemned as illegal, and all securities founded on it declared void. But on hearing, the Chan-

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THARP, &c. vs COTTON'S EX'S.

cellor dismissed the bill of review and gave precedence to the claim of Tharp, as already stated.

That which is put in issue and decides by the original bill, cannot be the subject matter of a bill of review.

In deciding as was done by the first decree, and by the opinion and mandate of this Court, that Tharp had a lien for his claim prior to that of Burke, all of the questions presented by the bill of review were in effect decided first by the Chancellor and then by this Court. With regard to the two first questions, no new fact or evidence is brought forward or proposed by the bill of review. But it seeks a re-investigation of them and a different decision upon the same record on which they were formerly decided. But as between the parties to the decree and to the decision of this Court, its decision upon questions of law apparent in the record, and which either were or might have been made, must, in the same suit and as to the same matter, be final, and certainly unreversible by the inferior tribunal on a bill of review. With regard to the third question, as to the justice of Tharp's claim, we have no doubt that the parties to the decree are just as much bound by the decision of this Court upon that question as upon the others, and that it must be deemed equally conclusive in the same suit and upon the same matter. Unless a change be made in the record the decision in this Court, whether involving mere law, or mere fact, or both, must be carried out in giving final operation to the decree. But on this third question, the bill of review proposes to change the state of the record by introducing new evidence with respect to a matter before decided, that is with respect to the justice and validity of Tharp's claim. How far and upon what terms he can do this, or has shown a right to do it in this particular case, and how far he has succeeded if he has the right, are the material points arising in this part of the case ?

Parties to decrees are bound by them until reversed; but may impeach them by a direct proceeding, on the ground of error, of law or of fact, or for fraud, by

If Burke was not a party to the decree and bound by it until reversed, his right would not be concluded by the disposition which it makes of the subject, nor by any decision of law or fact involved in it. Not being bound by it, he might, in the assertion of his own rights, disregard it or impeach it collaterally. If bound by it as a party, he can only impeach or change it by direct pro-

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ceeding on the ground of error of law or of fact, or on the ground of fraud. And this must be (by petition for re-hearing if in time or,) by writ of error or appeal, or by bill of review or bill in the nature of a bill of review. In whatever mode he became a party, if bound by the decree until reversed, he can only get rid of its effect by reversal, and he can only reverse it by the same mode of proceeding and on the same terms as applicable to himself, which the law has prescribed to all, for effecting the same object.

petition for a re-hearing, writ of error, appeal or bill of review.

Then as to his being a party to the decree and bound by it, we apprehend it is too late now to make the question. It is true he never was directly made a party to the suit of Tharp, nor did he make Tharp a party to his suit, but in March, 1843, these two suits and the two which Cotton had brought upon his mortgages, having been previously submitted for hearing, an order was made that the four cases be consolidated and heard together, on which the order of hearing was set aside and the cases remanded to the docket. In December, 1844, nearly two years afterwards, the four causes were heard together and a decree pronounced settling the rights of the parties, by determining the sum due to each and declaring the order of precedency between them, in the appropriation of the subject for which all were contending. The order of consolidation was made for the very purpose of avoiding the confusion which might ensue from separate decrees subjecting the same property to different claims, without determining the rights of the claimants as between each other, as well as against the common debtor; it must be understood to have been made in order that the Court might be enabled to make a joint decree, (or a joint and several decree,) which ascertaining the rights of each as affecting or affected by those of others, and directing a disposition of the subject in accordance with those rights, should be binding upon all. Such as we think was the effect as well as the object of the order of consolidation, and such was undoubtedly the character of the decree. It was a decree between all the parties to the consolidated suits, settling the rights of each, both with regard to the sums due and the respective rights of

Where cases are consolidated and heard together, the object of which is satisfaction out of a common fund, the object being to settle the claims of the respective claimants between each other, as well as their claims against the common debtor or fund, the decree is binding upon all the parties.

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THARP, &c. vs COTTON'S EX'S.

If in such case any party desire to contest the claim of another, he should have the opportunity to do so. He may do so by making such claimant a party to his bill.

the parties to have their claims thus adjusted and satisfied out of the fund in litigation. As the order of consolidation gives to the consolidated suits such a shape and effect as that a decree may be rendered which shall be binding upon all parties, it of course becomes the right and duty of each claimant to look into the record of the suits in which claims are set up that might affect his interest; and he may, upon the hearing, contest any such claim upon the record as it then stands, or he might, before the hearing, become a party to the particular suit, or make an unjust claimant a party to his own suit, and make such issues or proof as the case may admit of or require. He should, as a matter of justice, have an opportunity of exercising these rights, if the order of consolidation is forced upon him. The question of the amount and validity of the several claims set up in these proceedings *in rem*, is material only so far as the claim may reach the thing sought to be subjected, and in this view each claimant has the same right to contest the validity of the claim of another who is striving for precedency, as he has to question the sufficiency of the proceeding by which he attempts to gain it. And there can be no doubt that if a decree in consolidated suits such as was rendered in this case, should give precedence to a claim actually disproved or not sufficiently established in the particular suit in which it is set up, a postponed claimant might, though never made directly a party to that suit, reverse the decree on that ground, just as he might do if precedence were improperly given to a just claim.

We must presume that the parties to these consolidated suits understood these consequences of the consolidation which were in fact advantageous to all, and that they acquiesced in the order with the intent that one consistent decree might be made which should bind all of them. It is certain in point of fact, that all are parties to the decree, whose rights are settled by it. And as we concur with the Chancellor in considering the order of consolidation as a warning to all of the parties to make all questions necessary for settling the respective priorities as if they had been regularly brought into each case,

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there is no hardship or injustice, and especially when there was so long an interval before the trial, in holding, all bound as parties by the decree, and by the state of the record at the hearing.

It is contended that in this case the causes, although once consolidated, had in fact been afterwards severed by the removal of one of them from the Louisville Chancery Court into the Jefferson Circuit Court, from which it was afterwards brought back. But we do not find that either of the two suits now particularly in question, was ever in fact so removed. We find that some six or eight months after the consolidation of the cases, the two suits of Cotton upon the mortgages, were removed to the Jefferson Circuit Court by change of venue upon petition. About the same time there was a consent order for the removal of "these two causes," without naming them, but they never were removed; and the other two causes having been removed back into the Louisville Chancery Court, the four were tried together. The order relating to these two causes, if these be the two referred to, shows that they were considered as united. They are regarded as consolidated cases in the former opinion; and it may be fairly inferred from that opinion, that Burke did in fact contest in this Court, the sufficiency of Tharp's bill to create a lien in favor of his claim, whether he made the question as to the validity of the claim itself on account of the alledged illegality of its consideration, is not known. But it was a question made in the record, which he had a right to insist upon in the Chancery Court and in this Court, and which was necessarily decided in both Courts, in giving precedence to Tharp's claim.

Parties in consolidated suits are bound to notice the points in issue in the cases respectively, and they are bound by the decisions thereon.

As Burke or his representative in his own suit, was bound to take cognizance of this issue in one of the consolidated cases, and was to be bound by the decision of that issue, it is an inconsistency to say that he remained ignorant until after the decree, of the very fact which was expressly put in issue, or that his ignorance could avail him any thing. The allegation implies either a culpable negligence, or it implies more probably the mere personal ignorance on the part of Burke, of what his counsel, acting for him in the suit, must be presumed to have known.

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THARP, &c. vs COTTON'S EX'S.

In either view, his subsequent discovery of the fact would be no ground for a re-trial of the issue under a bill of review. But the record of Tharp's suit not only showed that this fact was in issue, but contained the deposition of one witness detailing circumstances which, taken in connection with the bill of exchange itself, filed in the same record, were calculated to lead, and doubtless did lead to the witness who proved the true nature of the consolidation. That witness was the payee of the bill, who must have been supposed to know the consideration, and who, for all that appears, was just as accessible and just as ready to give information or testimony before as after the first decree. If then the discovery of a new witness to a fact in issue, is under any circumstances a proper ground for a bill of review, we think it cannot be so in the present case, where, by the use of reasonable diligence with the means of information and the opportunity for enquiry and preparation which the party had, the witness might have been known and his deposition obtained before the decree.

We are of opinion, therefore, that the bill of review does not disclose sufficient ground for introducing new evidence into the case, whereby to affect the decree, upon the question as to the consideration of Tharp's claim, and the other questions presented being questions of mere law arising on the face of the record and decree as they came before this Court, and having been expressly or in effect, decided by it, cannot be again brought up by bill of review, upon the same record and decree, but are finally settled between the parties so far as they affect the disposition of the property sought to be subjected in these suits. As Burke, being a party to the decree and bound by it as such, while it remains in force, could only reverse or change it, or get clear of its effect by the direct modes of proceeding appropriate to the purpose, his bill cannot be sustained except as a bill of review, which it professes to be. And being insufficient in that character, it was properly dismissed. This conclusion renders unnecessary any enquiry as to the benefit which Burke might have had from the facts set up in the bill, or as to his

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right to set them up, if he had not been a party to the decree, or if the particular fact had not been put in issue.

Wherefore, the decree dismissing the bill of review, and the decree distributing the proceeds of the attached property, are both affirmed.

Crittenden and Thruston for appellants; *Pirtle and Guthrie* for appellees.

Blanchard and Wife *vs* Taylor's Heirs.

CHANCERY.

APPEAL FROM THE MASON CIRCUIT.

Case 155.

Conveyances. Champerty. Executions. Trust estates.

JUDGE BRECK delivered the opinion of the Court.

October 4.

Case stated.

IN 1786, a grant issued from the Commonwealth of Virginia to Anthony Thornton for thirty three thousand seven hundred and fifty acres of land, lying in the present counties of Mason, Nicholas and Bracken. In 1793, Thornton conveyed 11,775 acres of this land to Richard Taylor, attorney for Philip Buckner. The consideration of this conveyance, appears from the recitals in the deed, to have been an obligation from the patentee to the locator, which Buckner held as assignee.

In 1795, Buckner conveyed 7,180 acres, part of the 11,775, to Baldwin B. Stith. After the death of Stith, in 1835–6, three of his heirs conveyed their interest in the 7,180 acres, to the appellant, R. T. Blanchard, whose wife was also one of the heirs, and the only one in addition to those who had made the conveyance to Blanchard.

In 1840, Blanchard exhibited his bill in the Mason Circuit Court, alledging the foregoing facts, and also alledging that under executions against the heirs of Stith, he had purchased their interest in 1839–40, in the tract of land conveyed by Buckner as aforesaid to their ancestor, and had obtained a conveyance from the Sheriff.

Relying upon these purchases from the heirs and at Sheriff's sale, the complainant sought a conveyance of the legal title from the heirs of Richard Taylor, who had

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BLANCHARD, &c. vs TAYLOR'S HEIRS.

as aforesaid obtained it by the deed from the patentee, to him as attorney for Buckner, and which he had held in trust for Buckner and his assignees.

The complainant further alledged, that in 1798, one Richard F. Kissam, pretending to be attorney in fact of Stith, had in that character conveyed about fourteen hundred acres of the 7,180 acre tract, to one George Williams, whose heirs, after the death of Stith, had set up claim to it, and had taken possession and sold portions thereof to sundry persons, who were then in possession residing upon the land. He alledges that the sale by Kissam was without authority, and prays to be quieted against the conveyance made by him to Williams.

By an amended bill, the wife of Blanchard, as one of the heirs of Stith, is united with him as complainant. The unknown heirs of Thornton, the heirs of Taylor, Buckner, Stith, except the complainant, and of Williams, and the tenants in possession, were made defendants.

The heirs of Williams alone resisted the relief sought, except so far as answers were filed for a part of the heirs of Thornton and Buckner, &c. as infants.

Williams' heirs resist, upon the ground that the conveyance from Stith's heirs to Blanchard was champertous; that he acquired nothing by his purchase at the alledged Sheriff's sale; that Kissam was authorized to make the sale and conveyance to their ancestor. They rely also upon an adverse possession for more than twenty years, and the staleness of complainant's equity.

Decree of the Circuit Court.

The Court below, at the May term, 1843, decreed a conveyance from Thornton, Taylor and Buckner's heirs to the complainants to all the 7,180 acres, except as to the part claimed by the heirs of Williams, and as to them and that part of the land, reserved the case for future decision, and at a subsequent term, dismissed the bill. Blanchard has appealed to this Court.

Whether the first decree was ever carried into effect, does not appear, and it is somewhat doubtful whether the final order, dismissing the complainant's bill, applies, or was intended to apply to the whole case, or only to that portion of it not disposed of by the first decree. The first decree granted all the relief sought by the complain-

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ant as to the entire 7,180 acres, except so far as it was embraced in the deeds under which the heirs of Williams set up claim. That decree was, therefore, a final disposition of the whole case, except as to the land claimed by Williams' heirs.

Nothing remained to be done, except a conveyance to the complainant by the commissioner appointed for that purpose in the decree, upon the failure of Thornton, Taylor and Buckner's heirs to convey as directed. That decree, so far as appears, was never set aside, and no effort has ever been made, nor is any now made, to disturb it. Being final, the Court at a subsequent term, had no power to set it aside, and the decree, dismissing the complainant's bill, will therefore be considered a dismissal merely so far as relief was sought as to the land claimed by Williams' heirs. Whether there is any error in the decree upon this construction of it, we will now proceed to inqure.

And first, as to the title as set up and made out by the complainant. He exhibits the patent to Thornton, and also what purports to be the copy of a deed from the patentee to Taylor, as attorney of Philip Buckner, for 11,775 acres of the land embraced in the patent, bearing date in March, 1793, and recorded in the Court of Quarter Sessions in Mason county, in December, 1794. It is objected that this copy furnishes no evidence of a conveyance from Thornton to Taylor.

1st. Because the original deed was not properly authenticated for record.

2d. Because it was not recorded within the time required by law.

In virtue of the 10th section of the act of 1831, the last objection would be clearly not available, provided the deed had been duly proven or acknowledged. But such appears not to have been the case. The deed was admitted to record in Mason county upon this certificate:

Caroline, June Court, 1793.

"This deed was acknowledged and ordered to be recorded. Test, *William Nelson.*

Truely recorded,

Test, *John Pendleton, D. C.*"

"Caroline, June Court, 1793. This deed was acknowledged and ordered to be recorded.—Test, W. N.—Truely ecorded, Test,

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BLANCHARD, &c. *vs* TAYLOR'S HEIRS.

J. P., D C."— Held not to be sufficient evidence of an acknowledgment of the deed before a Court of law of the county in which the grantor dwelt, nor is there any thing to show that such is "the usual manner of authenticating such acts," and there is no seal.

The act of 1785, provides that a deed, when the grantor is a non-resident, acknowledged before any Court of law of the county in which the party shall dwell, and when so acknowledged and certified by such Court in the manner such acts are usually authenticated by them, and offered to the proper Court, to be recorded within eighteen months after the sealing and delivering, it shall be as effectual as if it had been in the last mentioned Court. From the recital in the deed, Thornton was a resident of Caroline county, in Virginia, and this would be sufficient evidence of that fact, as has been held by this Court.

It might also be presumed that the deed was acknowledged by the grantor, although the certificate does not show that fact. But the certificate does not purport, nor can it be presumed to be in the usual manner of authenticating such acts. No seal is attached to it, and whether William Nelson was the Clerk or the Judge of the Court, is left entirely to inference and conjecture.

But whether the authentication was or not sufficient to authorize the deed to be legally admitted to record, is not material. The complainant expressly alledges that the copy is a true copy of the original deed, and this allegation is not denied by William's heirs. So far from controverting the title of Stith, they set up and rely upon title derived from him, and they rely upon title derived from no other source. This copy was read as evidence upon the trial, without objection, and it is, therefore, too late to raise an objection to it here. There was then, sufficient evidence of the conveyance from Thornton to Taylor, as attorney of Buckner, and the question arises as to the character and effect of that conveyance.

The right and interest of a *cestui que trust* in land, is subject to sale under execution since 1796, and the legal title passes by the sale to the purchaser. The land is subject to sale and passes by it not a mere equity.

It clearly appears from its recitals, that the entire consideration moved from Buckner, and that Taylor acquired no beneficial interest under it whatever. He held the naked legal title merely, and that in trust for Buckner. The trust being manifest from the deed itself, the estate or land thereby conveyed was subject to sale under execution against Buckner, in virtue of the thirteenth section of the act of 1796, (1 *Stat. Law*, 443,) which declares that "estates of every description holden or possessed in trust, shall be subjebt to like debts and charges

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of the persons to whose use, or for whose benefit they were or shall be respectively holden or possessed as they would have been subject to, if those persons had owned the like interest in the things holden or possessed as they own or shall own, in the uses or trusts thereof."

A *cestui que trust* conveyed land, the grantee died. Held that his heirs upon whom his right under the deed passed, had such an interest in the land as might be sold under execution.

Buckner, in 1795, as we have seen, conveyed by deed duly recorded, the land or 7,180 acres thereof to Stith, which upon his death, descended to his heirs, provided he had not parted with his title. Under such circumstances had Stith's heirs such an interest as was subject to execution? We think they had. Stith by the conveyance from Buckner, acquired all his interest and occupied his attitude in reference to Taylor, as trustee, and whatever interest Stith had, descended upon his death to his heirs. We are not aware that this question has been expressly settled by this Court, but the principle was in effect, settled in *Strode* vs *Churchill*, (2 *Litt.* 12.) In that case slaves were held in trust for several *cestui que trusts*, who divided them among themselves, and the the slaves thus alloted to each, were held subject to execution for the debts of each severally. But the proposition is too plain to require either argument or authority that Taylor held the title in trust for Stith, after he acquired Buckner's interest, and for Stith's heirs after his death; and we have as little doubt that the interest of the heirs in virtue of the statute referred to, was subject to execution.

Land held adversely to the defendant in the execution is liable to sale under the execution:—(1 *Dana*, 211; 6 *B. Monroe.*)

Whether the land, when Blanchard purchased under execution against Stith's heirs, was or not held adversely by Williams' heirs or those claiming under them, would not be important. Under the act of 1828, land, although in adverse possession, is still subject to execution, as held by this Court in *Frizzle* vs *Veatch*, (1 *Dana*, 211,) and in *Ring* vs *Gray*, (6 *B. Monroe*, 368.)

But it is important to enquire what interest or title Blanchard acquired by his execution purchase and the Sheriff's deed, and in considering this question we must first determine as to the validity and effect of the conveyance from Stith's heirs to Blanchard in 1835, prior to the sale under execution.

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Thrap, &c. vs Cotton's Ex'rs.

It is sufficiently established by the testimony, that *the* land in contest at the time of those conveyances, was in the adverse possession of Williams' heirs or those claiming under them. It is true Williams' heirs claimed to hold under a deed purporting to be made by one Kissam, as attorney in fact for Stith, and hence it is contended that as the possession was held under the same original title as that claimed by the heirs, that it was not adverse and that consequently the conveyances were not champertous; and in support of this position the case of *Chrisman* vs *Gregory's heirs*, (4 *B. Monroe*, 474,) is referred to. That case when examined, will be found not to sustain the principle contended for. The question here presented, did not arise in that case. The parties here claimed the land as their own, they did not look to Stith or his heirs for title, but claimed it under a deed which had been made to their ancestor and duly recorded, for near forty years. The possession under it was adverse, and would have been so had the deed been made directly by Stith himself. The construction given by this Court to the act of 1824, (1 *Stat. Law*, 285,) in *Lillard* vs *McGee*, (3 *J. J. Marshall*, 475,) and other cases, clearly embraces this case, and renders the conveyances in question void.

The land which is held in trust, is subject to sale by the statute to satisfy the debt of *cestui que use*, not the mere use, and by such sale the trustee is divested of the legal title, and it passes to the purchaser: *Eastland* vs *Jordan*, (3 *Bibb*, 186.)

The sale under execution, therefore, was not affected by them, and the purchaser acquired thereby, as the record now stands, and upon the supposition that the interest conveyed by Buckner to Stith descended to his heirs, a fee simple estate in the land, the legal as well as the equitable title. The statute declares that estates of every kind, holden in trust, not the use or uses therein, shall be subject to the debts of the *cestui que trust*. It is the *thing* itself which the statute authorizes to be subjected. Prior to the statute the *estate* could only be reached in a Court of equity. The statute was designed to effect the same object at law by subjecting the entire estate, and such has been the construction given to it by this Court: *Eastland* vs *Jordan*, (3 *Bibb*, 186;) *Strode* vs *Churchill*, *supra*, and other cases.

From this view of the case, it results that the complainant's remedy was ample at law, and the main ground

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alledged for resorting to a Court of equity fails. He alledges that he could not prosecute an ejectment, because the legal title by the deed of Thornton, passed to Taylor instead of Buckner, and Taylor, as he was informed, had died many years before. Whether Taylor was living or had died, and the title had descended to his heirs at the time of the sale under execution, was not material. Wherever it was it was still held merely in trust, and passed by the sale.

But the complainant seeks to be quieted as to the incumbrance of the deed by Kissam as attorney in fact of Stith to Williams, and that the persons in possession of the land may be decreed to surrender it. Assuming, however, as we do, that the complainant had ample remedy at law, this would not constitute sufficient ground for resorting to a Court of equity for relief.

In view of the whole case, therefore, we are of opinion the Court below was right in dismissing the complainant's bill, but erred in not dismissing it without prejudice to his remedy at law.

Wherefore, the decree is reversed and the cause remanded with directions to dismiss the complainant's bill with costs, as to the heirs of Williams and those claiming under them, and as to so much of the lands embraced by their deeds, but without prejudice to any remedy the complainant may have at law.

Beatty for appellant; *McClung & Taylor* for appellee.

Kane *et al. vs* Pilcher, &c.

CHANCERY.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Case 156.

Attached effects. Bankruptcy. Chancery practice.

JUDGE SIMPSON delivered the opinion of the Court.

October 4.

THE slave Jim having been levied on by a chancery attachment, was during the continuance of that levy in the custody of the law, and under the entire control of the Chanceller, and could not be levied on, or sold by

Property levied on by attachment, is in the custody of the law, and under the entire con-

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KANE *et al.* *vs* PILCHER, &c.

execution, as was decided by this Court, in the case of *Hackley's executor* vs *Swigert*, (5 *B. Monroe*, 86.)

That a bond had been executed by one of the defendants in the chancery suit for the delivery of the slave when required by the Chancellor, does not change the principle which prohibits a sale by execution of personal estate under attachment.

trol of the Chancellor. —And not subject to levy and sale under execution: *Hackley's exec'rs.* vs *Swigert*, (5 *B. Monroe.*)

The equitable lien on the attached goods resulting to the complainant from his suit *in rem*, is not discharged by the execution of such a delivery bond: *Bell* vs *Pearce*, *&c.* (1 *B. Monroe*, 73.) The levy is not thereby suspended, but the defendant holds the property under the levy which still exists, as bailee or depository, subject to the Chancellor's order or decree. If it could be taken and sold by execution, the obligees in the bond might not have it in their power to comply with its conditions, the object of the suit in chancery might be defeated, or the whole liability, to the extent of the complainant's demand, be thrown on the security in the delivery bond. This, in effect, would render nugatory the provisions of the law authorizing the execution of such bonds. The defendant in the attachment being generally in embarrassed circumstances, would be unable to obtain security and execute a bond, if the law permitted the same property to be seized and sold by execution creditors as soon as it was out of the hands of the officer who levied the attachment. Nor is the rule on this subject changed by the fact that the property attached belonged to the defendant in the execution, and not to the debtor of the attaching creditor. The right to the property was contested in the suit in chancery. The complainant claiming it to be the property of the defendant, who was his debtor, the other defendant who was the defendant in the execution claiming it as his own, and denying that it was subject to the attachment. The property was in the custody of the law, and under the control of the Chancellor, and every reason which requires its exemption from execution in the one case, applies with equal force to the other. As, however, the execution creditors of the defendant to whom the property really belonged, were prevented by the pendency of the suit in chancery and the levy of

The execution of a bond for the delivery of property attached by the Chancellor, does not release it so as to make it subject to execution: *Bell* vs *Pearce*, (1 *B. Monroe*, 73.)

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the attachment, from enforcing the collection of their executions by the sale of the attached goods, this impediment to their legal remedy, gave them a right to be made parties to the suit, and come into chancery to subject the property to the payment of their demands; and whenever creditors go into a Court of equity for this purpose, a lien on the property attached, is created in their favor, from the time they bring their claim before the Chancellor, in the event that the complainant in the attachments fails in the object of the suit. Spotts therefore acquired no title to the slave Jim, by his purchase under execution. To the amount of the execution paid by him for this slave, he had a right in equity to take the place of the creditor, and to avail himself of any remedy which the creditor had. His suit in chancery would consequently have given him a lien on the property attached, so far as he acquired an interest in the execution by the payment of the price bid by him for the slave Jim, were it not that previous to the institution of his suit in chancery, the defendant in the execution had become a bankrupt, and his right and title to the property in controversy had vested in his assignee. Spotts therefore was not entitled to any relief beyond that given to him, and the decree of the Chancellor is right so far as he is concerned.

The Chancellor has power even after the case is out of Court, to make all such orders and rules upon the parties as may be necessary to place them in possession of their right of which they may have been deprived by his precedent action in the case between them.

As the slave had been sold under the decree of the Chancellor, and the money paid over to the complainants, and as the decree had been reversed by this Court, and the slave held not subject to the complainant's demand, it was right and proper that the Chancellor should order the repayment of the money, either to the defendant to whom the slave actually belonged, or to such person claiming the fund as in equity was entitled to it. A rule for this purpose on the complainants, was an appropriate remedy, either during the pendency of the suit, or even after its dismissal. And as the assignee has a right to defend all suits depending against the bankrupt at the time of his bankruptcy, and had in this character a claim to the proceeds of the sale of the slave, his motion to be made a party, was proper, and the complainants had no right to defeat the object of that motion by a dismissal of

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KANE *et al.* vs PILCHER, &c.

their suit before making him a party. It might not, however, in this case, have been material whether the suit was dismissed or not before the assignee was made a party, if as we suppose, the assignee could have used the name of the bankrupt for his use and benefit, in a rule against the complainants, requiring them to pay over this money to him.

The limitation of two years for the commencement of suits by assignees in bankruptcy does not apply to applications to the chancellor for a rule for the refunding of monies which may have been improperly decreed to others and the decree reversed.

The argument that no rule can be prosecuted in chancery after the parties are out of Court, is founded on a total misconception of chancery practice. Suppose a decree to be rendered against a defendant for a sum of money which is paid to the complainant, the decree is afterwards reversed on the ground that there is nothing due to the complainant, and his bill is directed to be dismissed, which is done accordingly, would the defendant be driven to his action at law to recover the money which the complainant had wrongfully obtained? Would not the Chancellor, by rule, require its restitution? Has he not the power? Is it not his duty to relieve the parties from the effects of his own erroneous action? Can the complainant evade this power, by a dismissal of his suit, and an attempt to withdraw himself from the jurisdiction of the Chancellor? Certainly not, the well established chancery practice authorizes this proceeding by rule, to enforce in favor of either party any right growing out of the action of the Chancellor in the progress of the chancery suit.

Under the bankrupt law, the assignee had a right to prosecute and defend all suits to which the bankrupt was a party, and to claim all his rights in view of his appointment as assignee; and a right to be made a party to any controversy in which as assignee he might have an interest.

Nor is this case affected by the provision in the bankrupt law, limiting the time in which suits are to be brought by, or against the assignee in bankruptcy to the period of two years. This suit was pending at the time of the bankruptcy. No suit was brought by the assignee. The limitation of two years has no application to suits pending at the time of bankruptcy. The bankrupt being a defendant to the suit, and having claimed the slave in controversy, his assignee was entitled to all his rights, and time would not certainly bar a claim which had been in litigation between the parties from the time the claim originated.

Wherefore, there being no error in the decree of the

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Chancellor, it is affirmed on the appeal of Kane *et al.*, and also on the writ of error prosecuted by Spotts.

Loughborough and Ballard for appellant; *Pirtle and Crittenden* for appellees.

Howard, *et al. vs* Coke, *et al.*

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CHANCERY.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Case 157.

Will case. Charging the jury. Instructions. Witness.

JUDGE SIMPSON delivered the opinion of the Court.

October 5.

THIS is a controversy about the validity of the will of Polly Bullitt, deceased. The will is assailed on two grounds: First, a deficiency of understanding on the part of the testatrix; and Secondly, that its execution was procured by the exercise of undue and improper influence.

The grounds on which the will is assailed.

The record contains a large mass of evidence, both in support of, and against the will. The main questions presented for the consideration of this Court, are, the correctness of the instructions to the jury on the law of the case, and the right of the Chancellor to charge the jury on the evidence.

The complainants moved for the following instructions:

1st. That a person making a will must posses a sound mind, that is, common sense; which is adequate reason and judgment upon ordinary subjects like other rational men.

Instructions moved in the Chancery Court by complainant.

2ndly. That a person making a will must possess capacity to manage and attend to the ordinary affairs of life.

The Court declined giving them, and in lieu thereof, gave the following:

1st. That though Polly Bullitt, the testatrix, may not have been an idiot, in the strict legal sense of the term, yet she must have had intelligence competent to the understanding and making this will.

Instructions given by the Chancellor.

2nd. That if she knew she had property, its uses and value, and that it was in her power to dispose of it as she

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HOWARD, *et al.* vs COKE *et al.*

pleased, knew who were her near relations, to whom her property would go at her death, if not disposed of by her; knew that if she died intestate, her property would go in one way, and that it was in her power by making a will, to cause it to go in another way; was capable of forming partialities and preferences among her relations, for reasons that would influence most rational persons, and select among them for like reasons, the objects of her bounty, and had the desire and matured determination, from her own free volition to make a will, for the purpose of giving her property to these devisees, to the exclusion of her other relations, then we are bound to infer that she must have had the competent legal capacity to make this will, though she may not have been competent to have advantageously trafficked with her property, or properly to have managed it without the assistance of others. But though the jury should believe that she possessed the amount of mental capacity here indicated as sufficient to make this will, yet if they believe she was of very weak mind, liable to be imposed upon and influenced by others, then they should give a jealous scrutiny to the facts in proof, to see that the will was not obtained by any undue or improper influence, exercised at the time of its execution, and that the desire to make such a will was not the mere result of such influence theretofore exercised. That the burthen of proof of such influence and its exercise, rests upon the complainants who assert and rely upon it.

The complainants also asked the following additional instructions:

Further instructions asked by the complainant.

1st. If the jury believe from the evidence, that Polly Bullitt was an idiot from her birth, then she had not a right to make a will, however wise its provisions might appear.

2d. That if from her birth, the jury find that said Polly, from defect of reason, was not capable, under the best instructions, of learning how to read, and to count, and to knit, and to sew, and to write, and to take decent care of her person; and if they find that for defect of reason she was not capable of doing any one of these things, then they should find her to be an idiot from her birth.

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3d. If they find from the evidence, that Polly Bullitt was incapable of learning either to read or to write, to sew, to knit or to count; and in addition thereto, that she was unable, from defect of reason, to take care of herself; and that she was never able to acquire the amount of reason usual among girls of ordinary minds of twelve years of age, then they ought to find for the complainants.

4th. If the jury believe from the evidence, that the testatrix was incapable of acquiring, by conversation and instruction, a competent share of understanding to enable her to govern her estate and take care of her person with reason, then they ought to find that her mind was not sound.

5th. If they find that she was not capable, for defect of understanding, of acquiring by conversation and instruction, the amount of knowledge usually possessed by a child of ten years of age, then they ought to find that she was not competent to make a will.

6th. That a person who advances to the age of thirty four years without possessing or being able to acquire as much mind as an ordinary child of seven years of age, is not, in legal contemplation, of sound mind.

The Court gave the first and sixth and overruled the others.

Instructions given on the trial of an issue of competency or incompetency to make a will, should not restrict the jury to inquiries involving memory alone, and not reason and a knowledge of the natural obligation to relatives.

The instruction given to the jury by the Chancellor is liable to the following objection: It is based upon the knowledge of certain facts, without discriminating as it should have done, between such knowledge, as the mere effort of memory alone, or as the exercise of reason. The things enumerated in the instruction should not only have been known, but they should have been known and comprehended. Certain facts may be impressed upon the memory and desires created, where a very slight degree of intellect exists. A child of three or four years of age may be taught a great many things more than it can comprehend; it may know them, but not understandingly. So in this instance, the testatrix may have had knowledge of these facts, by having heard them frequently alluded to, and still may not have had intellect enough to understand them. And in addition to the facts enu-

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merated in the instruction, a knowledge of her natural obligations to her other relations should have existed. She may have known her near relations, and yet may not have comprehended the duty resulting from that relationship.

It is not proper in such cases to group a set of facts together, and say their existence or non-existence is conclusive of capacity or incapacity; the jury should be left to weigh all the facts proved, which bear upon the question of capacity.

We are also of opinion that it was improper to select a group of facts on either side as conclusive evidence of capacity or incapacity to make this will. The facts enumerated in the instruction given, and in those asked upon the other side, are evidence on the one side of sufficient capacity, and on the other of the absence of such capacity. The question of capacity must, however, at last be determined by weighing and considering all the facts proved which bear upon it. The instruction as given, and the second and third instruction moved for by the complainants and overruled, are all liable to the objection, that they make the facts upon which they are predicated, conclusive of the question at issue.

It is not requisite that a testator should have that strength of mind to authorize him to make a will as is necessary to traffic with and manage property advantageously.

The Chancellor was correct in his decision that it did not require as much capacity to make a will, as was necessary to traffick in property, or to manage it advantageously. In dealing with others, a person of weak understanding is subjected to the influence of the cunning and adroit representations that may be made use of, for the purpose of accomplishing the end desired. In making a will, such person, in the absence of all improper influences, has only to consult his or her own judgment and inclinations, and follow out their promptings; which evidently requires less capacity than is necessary to the successful management of an estate, or even its management with reason and discretion.

These suggestions are deemed sufficient to determine the propriety of giving or refusing any of the instructions that were moved for, without subjecting each instruction separately to a critical examination.

The Judges in Kentucky have not the right to charge the jury upon the facts, as was the case in England. It

After the argument of counsel was concluded, the Chancellor charged the jury upon the evidence. The charge is contained in the record, and is in effect, an argument in favor of the validity of the will. The jury were, however, explicitly informed of the distinction be-

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tween an instruction on the law of the case which they were bound by, and a charge by the Chancellor, to which they might give just such consideration as they deemed proper. We do not deem it necessary to decide whether the charge in this instance would exceed the bounds of propriety, if a charge from the bench to a jury on the evidence, be authorized by law. Such a right exists in England and in some of our sister States. It has never, however, been exercised in this State, and if the non-existence of a right is at all inferrable from the fact that it has never been assumed or used, the custom in this State on this subject, must be deemed conclusive against the existence of the right. By general consent and common understanding of what the law is, a different usage has prevailed. In civil cases the law is decided by the Judge, the facts of the case being left exclusively to the decision of the jury, unbiassed by the influence of the Court or any judicial suggestion. This distinction between the province of the Judge and the jury, has not only been established in the Circuit Courts, but has indirectly been sanctioned by its recognition in numerous cases in this Court. Any encroachments by the Judge upon the province of the jury, is regarded with jealous suspicion, not it is true, by the jury themselves, who in doubtful cases, would willingly receive an intimation from the Court as to its opinion on the facts, but by the parties whose rights may be affected by such interference. As a mere question of expediency, much may be urged on both sides. In this aspect of the question, however, it is one for legislative and not judicial action. If the system which has prevailed since our Commonwealth has had an existance, and which must now be regarded as the law of the land, is considered defective—if the exercise of the right by the Judge to charge the jury be deemed necessary to the perfection of this mode of trial, and called for by the delays and imperfections which are supposed to be incident to it in its present form, the power to effect the change is not in the Courts, but in another department of the government, whose duty it is to provide a remedy for the evil, if one exist.

has never been exercised in Ky. In civil cases the Court decides the law, and the jury the facts, uninfluenced by any judicial suggestion.

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HOWARD *et al.* vs CORE *et al.*

The case of *Ray* vs *Woods*, (2 *B. Monroe*,) cited. The Court say the question is there left open.

The case of *Ray* vs *Woods*, (2 *B. Monroe*, 229,) has been referred to as deciding the right of the Judges to charge the jury on the facts of the case. The question is there left open, the Court merely deciding that if the power should be exercised, and nothing was contained in the charge calculated to mislead the jury or to divert their attention from the issue, or the facts to be found by them bearing upon the issue, the verdict for this cause, should not be set aside. In that case the Circuit Judge had stated to the jury that in making up their verdict, certain circumstances should be taken into consideration by them. It was in effect, deciding that those circumstances were evidence which they had a right to consider. Whether evidence or not, was a question of law which the Court had to determine, and the statement of the Judge to the jury might have been sanctioned upon that principle. We do not regard that case as settling the question; and looking to the custom that has universally prevailed in this State to the contrary, and the difficulties that would ensue from allowing the exercise of this power in the restricted form suggested in the case of *Ray* vs *Woods*, when every charge would be subject to revision by this Court, we have come to the conclusion the power does not exist in the Judge, and cannot be exercised by him to any extent.

The guardian of a testatrix held to be a competent witness to prove her capacity to make a will.

James Guthrie, who had acted as the guardian and agent of the testatrix, was introduced as a witness in support of the will, and his testimony objected to on the ground that he was interested in establishing the capacity of the testatrix; that his liability might be greater if she were determined to be of unsound mind and unable to have authorized or ratified any of his acts, or to have constituted him her agent, than if the converse of the proposition were true. This objection was overruled, and we think properly. His interest, if any, being remote and contingent, it went to his credibility only, and not to his competency.

But for the error in the instruction given to the jury, and the unauthorized assumption of power by the Chancellor in commenting upon the evidence, the decree is reversed and cause remanded, that a new trial may be

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granted, and for further proceedings consistent with this opinion.

SWIGERT, &c. vs GRAHAM.

Clay, Duncan, Fry & Page and Bullitt for appellants; *Pirtle and Thruston* for appellees.

Swigert, &c. *vs* Graham.

CASE.

ERROR TO THE FRANKLIN CIRCUIT.

Case 158.

Case. Bailments. Actions ex delicto and ex contractu. Parties. Instructions. New trial.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

October 7.

THIS action on the case was brought by Graham against the owners of the steam boat Oliver Anderson, to recover for the loss of Edmund, the plaintiff's slave, who while employed as a hand, hired for the service of the boat, was drowned in the Kentucky river, in August, 1844. The declaration avers that Edmund was employed on the boat for hire to be paid to the plaintiff; that the captain, officers and agents of the defendants having the management of the boat, and the direction of Edmund, &c., not regarding their duty in that behalf, took so little and such bad care of the boat that it was run aground, and that they took so little and such bad care of Edmund, &c., that owing to their carelessness, negligence, unskilfulness, misdirection and mismanagement of said boy Edmund, &c., he was drowned.

Case stated.

1. It seems that one of the owners of the boat was not joined in the action, and that one of the defendants was not an owner. And the first of these facts having been pleaded in abatement, and a demurrer to the plea sustained, the first question is, whether the action was subject to be affected by the nonjoinder alledged. It is doubtless true that the mere circumstance of the action being in form "*ex delicto*," should not conclusively relieve it from those rules with regard to the consequences of nonjoinder or misjoinder of parties, which apply peculiarly to actions in form "*ex contractu*," and do not in general apply to those of the other class. The grounds

Where an action is not brought for the mere nonfeasance of a contract, but for tortuous negligence or mismanagement, or the exercise of rights and duties belonging to the relation which arises out of the contract, a nonjoinder of part of the contracting parties, or the joinder of others, will not affect the right of recovery.

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SWIGERT, &c. vs GRAHAM.

of discrimination between those cases in which these rules are, and those in which they are not applicable, are not however, so far as we have seen, precisely defined. But this action is clearly not brought for the mere nonfeasance of a contract; but for tortious negligence or mismanagement in the exercise of rights and duties belonging to the relation which is itself created by contract. The action is not brought for the non-delivery of the boy according to the terms, express or implied, on which he was hired, but for the breach of a duty imposed by law upon a party who has the possession and use of the slave of another, whether on hire or not. And although the declaration would not in this case be sustained, unless there were evidence that the boy Edmund was in the service of the boat on hire, it is not necessary to prove any stipulation of that contract, and therefore it is not, in view of the question now on hand, necessary to prove the contract. The action on the case for a breach of warranty on a sale, put by *Chitty*, 1 *vol.* 74, as an example of a case in which as a contract is to be proved, the rules applicable to actions *ex contractu* should apply, is not analagous to the present case. In the action for a breach of warranty, whether in case or assumpsit, the action is essentially for the nonfeasance of the contract, and for nothing else. We are not satisfied that the present case should form an exception to the general rule which prevails in actions in form *ex delicto*, and are therefore of opinion that the plaintiff's right of recovery in this suit, should not be affected by the alledged nonjoinder or misjoinder of parties defendants.

The bailee of a slave for hire is bound to ordinary diligence in regard to the health, safety, &c. of the slave, and responsible for ordinary neglect, as in all cases of bailment for hire.

2. The material question in the case is, whether under the actual circumstances, the owners of the boat are liable for the loss of the slave, by being drowned while in their employ. And this question depends not merely upon the general principles applicable to the case of bailment on hire, as they are stated or adjudged in relation to inanimate or to mere animal property, but upon the proper application or modification of those principles in reference to the particular case of a slave hired for service as a common hand on board of a steam boat engaged in the navigation of the Kentucky and Ohio rivers. The

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rule that the bailee on hire, is bound to ordinary diligence, and responsible for ordinary neglect, is doubtless true in all cases of their bailment, unless there be fraud or a special contract by which it may be varied in the particular case.

But what is or is not ordinary diligence may vary, not only with the circumstances under which the subject of it may be placed, but with the nature of the subject itself. That which in respect to one species of property might be gross neglect, might in respect to another species be extraordinary care. And under peculiar circumstances of danger, extraordinary exertions may be required of one who is bound only to ordinary diligence, or in other words, the circumstances may be such, that extraordinary exertions are nothing more than ordinary diligence.

But what is ordinary care, or care in regard to one species of property, may not be so in regard to other property; it may vary on account of the subject itself, or on account of the circumstances in which it is placed.

Ordinary diligence, then, means that degree of care, or attention, or exertion, which under the actual circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing were it his own property, or in doing the particular thing were it his own concern. And where skill is required for the undertaking, ordinary diligence implies the possession and use of competent skill. On the other hand, the same principles which impose on the bailee these obligations, impose on the bailor, (in the absence of special contract or representation,) the corresponding obligation that the thing or property hired for use shall be reasonably fit for the purpose, or capable of the use known to be intended: that is, that it possesses the qualities usually belonging to things of that kind when used for the same purpose.

Ordinary diligence means that degree of care or attention, or exertion which under the actual circumstances a man of ordinary prudence and discretion would exercise in reference to the particular thing were it his own property.

And of course the bailment of property on hire for a particular use or service, implies the right on the part of the bailee to use it in that service in the ordinary way, unless at some particular period or part of the service, there should be special circumstances rendering such use improper, and which are, or ought to be known to him. Having a right to rely upon its possession of the qualities ordinarily belonging to similar things used in similar service, he is bound to bestow only that degree of care, attention or exertion for the preservation of the thing

—So there is a corresponding obligation on the bailor who knows the use for which property is bailed that it is capable of the use for which it is hired; and implies a right to use it in that service in the ordinary way, unless there should be some special

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which is ordinarily bestowed for the preservation of things of that kind in that service.

reason at some particular time known to bailee why it should not be so used.

A slave being capable of voluntary motion, of observation, experience, knowledge and skill, is presumed in ordinary cases, to be capable of taking care of himself if disposed to do so, without constant supervision or physical control.

Applying these principles to the case of a slave hired either for general or special service, we come at once to the conclusion, that being ordinarily capable, not only of voluntary motion by which he performs various services, but also of observation, experience, knowledge and skill, and being in a plain case at least, as capable of taking care of his own safety as the hirer or owner himself, and presumably, as much disposed to do it, from his possession of these qualities, with habits and disposition of obedience implied in his condition, and on which the hirer has a right to rely, he may be expected to understand and perform many, and indeed most of his duties by order or direction more or less general, without constant supervision or physical control, and may be relied on, unless under extraordinary circumstances, for taking care of his own safety without particular instructions on that subject, and *a fortiori*, without being watched, or followed, or led to keep him from running unnecessarily into danger.

The hirer of a slave should not expose him to extraordinary hazard without necessity, and when necessary, that such caution should be used as a man of ordinary prudence would use in regard to his own slave, and this to be regulated by intelligence of the slave.

What sort of care or diligence then, is the hirer to use for the safety or preservation of the hired slave? Omitting to notice what may be necessary to his health and comfort, we should say that he ought not, by his orders, to expose him to extraordinary hazard, without necessity, though they be incident to the nature of the service; and that when he does expose him to such hazards, necessarily or properly, he should use such precautions, by instructions or otherwise, as the circumstances seem to require, and as a man of ordinary prudence would use in so exposing his own slave. It might be necessary in sending him to the bottom of a deep well or to the eave of a steep roof, to tie a rope around his waist. But if he were possessed of ordinary intelligence, it could not be required that in sending him across a wide bridge, he should even be cautioned not to jump or fall from it. Nor if there were a ford as well as a bridge crossing the river, both ordinarily safe, and with each of which the slave was well acquainted, would it be deemed necessary to direct him to take the one and avoid the other, unless

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there were some circumstances known or apprehended at the time, changing the usual condition of one or the other. Certainly it would not be necessary, when there was on the road which he was accustomed to travel, a ford to be crossed with which he was well acquainted, to tell him either not to go out of the usual track into the deep water, or not to take another road which he was not accustomed to travel, and which passed the river at a more dangerous place.

In the navigation of our rivers by steam boats, it might become necessary, in a particular case, that some one on board should swim to the shore with a line, though the attempt might be attended with great danger. This, though incident to the navigation, would be an extraordinary hazard, and doubtless it should not be ordered nor even permitted to be incurred without the use of such precautions within the power of the Captain or other officer, as experience might indicate for the occasion. But when the boat is aground on a bar or shoal, where the water on each side, and to the shore on each side, is not more than three feet deep, it could not be deemed necessary, in ordering a particular individual to go to the shore through the water, to do more, even if he were unacquainted with the bar, and could not see it plainly, than to point out its extent or the direction which he must take to the shore, or to advise caution in his proceeding, or to give such instruction as was necessary. But if he were well acquainted with the bar, or it were plainly visible through the water, and were, moreover, wide and safe, the direction to go to the shore would of itself be sufficient. It might be ordinarily assumed that the individual, whether white or black, slave or freeman, if he had common sense, would not go from the bar into the deep water, and the person giving the order would not be bound to anticipate such a deviation, and either to forbid it or in any manner to guard against it, but might pursue his own employment. Nor do we suppose that, if he knew the individual to be a swimmer, and saw that he was purposely deviating from the bar, with the view of swimming a few yards to the shore, he would be bound to order him back, or to caution him against it, unless

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SWIGERT, &c. vs GRAHAM.

from the temperature of the water or some other fact, he had reason to apprehend danger. The direction to go to shore on such an occasion, implies, without more said, that he should go by the known and safe way. It is only when, from the uncertainty or difficulty of the way, or from some other circumstance, there may be danger in executing the order given, that it is necessary, in the exercise of ordinary care or diligence, to accompany it with any other words or acts than such as are essential to make it intelligible and practicable.

The facts in this case which show how Edmund was drowned.

In this case the boat being on her downward trip from Frankfort to Louisville, had been aground in the deepest water, on a bar such as has been described, for about twenty four hours before the boy Edmund was drowned. She had been aground repeatedly before, on the same bar, and the crew, including Edmund, were familiar with the bar, which was besides, plainly visible from the boat. On this occasion two flats had been obtained from the shore, in which the freight, passengers, baggage and even the wood had been taken in repeated trips, from the steam boat to the shore. The water being warm and shallow, the hands employed in crossing the flats to and from the steam boat, had frequently gone through the water, pushing the boat; one of these flats having in it the wood of the steam boat, had been made fast to the shore a short distance below the bar, and there was deep water between them. On the second day it being deemed advisable to raise the steam in aid of the capstan, for the purpose of getting the steam boat ahead, an order was given, probably by the Captain, that the hands should go to shore and bring the boat with the wood. Several of the crew, with Edmund among them, got from the side of the boat on the bar, and went off, as some of the witnesses say, playing. But soon after an alarm was given, and they, or three of them were seen in the deep water, not far from shore, between the bar and the flat boat. Edmund was nearest the shore, and as some of the witnesses say, safe in water not waist deep, when the alarm was made on account of the other two, and a cry from some one on the boat for Edmund to save one of them by name. On this he seems to have turned back

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and was drowned, while the other two were saved by taking hold of the hauser, which had been extended to the shore for hauling off the steam boat, and was lowered at the moment so as to be within their reach.

Upon the foregoing facts, except as to the question whether Edmund had reached a place of safety before he was drowned, there is no discrepancy in the evidence; and the clear preponderance of the testimony in opposition to that of a single witness, which on the last trial was quite indecisive, is that Edmund was a good swimmer, that the order to go on shore was not addressed to him more than others, nor objected to by him; that it was given in the usual way, without anger or confusion, and was obeyed by Edmund and others with alacrity. It is also clearly proved that it was a part of the duty of deck hands and firemen, of which Edmund was one, to go into the water if necessary, for the purpose of getting the boat off when grounded. And that there was a broad and safe way on the bar, from the boat to the shore, with which Edmund and the others were familiar. He having gone repeatedly from the boat to the shore on each side. It was proved by the pilot that he knew that the boat drew more water than the depth of water on the bar, and it appears that on that trip she was without a yawl or skiff. The first of these circumstances was, perhaps, referred to in the declaration, in making the charge of improper management of the boat, in running her aground, and both of them may have been referred to in the instruction given for the plaintiff, which, though somewhat ambiguous, may be, and probably was, understood as bringing the want of proper care in the management of the boat, to bear upon the question of liability in this case. But there is not only no evidence upon the question whether it was proper or improper to attempt to force a passage over the bar under the circumstances mentioned, but if it were shown to have been improper, the fact would form no ground of liability in the present case, any more than if Edmund had voluntarily got off of the boat unperceived in the night, and walking from the bar had drowned himself in the deep water.

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SWIGERT, &c. vs GRAHAM.

One act of mismanagement in the navigation of a steam-boat, not immediately connected with the loss of a hired slave, cannot be made the ground of recovery for the loss of such slave.

The grounding of the boat, if the result of "little or bad care," or imprudent management on the part of the officers and agents of the defendants, is too remotely, if at all, connected with the drowning of Edmund by going off of the bar on the next day, to make the defendants liable for the latter act, because the former was done by their agents. Edmund was not drowned by the attempt to pass the bar with the boat, nor by the failure of that attempt, but by leaving the bar instead of passing on it in going from the boat to the shore. Nor can the drowning of Edmund be referred to the want of a yawl or skiff. The mere possibility that if one had been there it would have been used on this particular trip to the shore, is no ground for attributing his death to the want of it. In truth there was as little danger in walking on the bar as in going in the yawl. If there had been a yawl and they had gone in it directly towards the flat boat, and Edmund had jumped or fallen out of it and been drowned, it would have been just as reasonable to attribute his death to going in the yawl, as to attribute it now to the want of a yawl. The absence of the yawl during one trip on the narrow waters between Frankfort and Louisville, could not render the owners of the boat liable for every accident that might possibly not have happened if there had been a yawl, any more than the grounding of the boat could render them liable for every accident that might happen while she was aground, because such accident possibly might not have happened if she had stopped at the head of the bar or returned to Frankfort.

—And a reference to such act of mismanagement in an instruction given to the jury, was calculated to mislead the jury.

The apparent reference to the responsibility of the defendants for a mismanagement of the boat, probably tended to mislead, or at least to confuse the jury, by directing their attention to the enquiry whether it was right or wrong to attempt to pass the bar, or to have made the trip without a yawl. The defendants were not responsible to the plaintiff for the boat or its management, but for Edmund and his management. The sole question was, whether through their agents they had so acted with reference to the boy Edmund, and with reference especially to his going to the shore on the particular occasion, as to make them liable for his being drowned in his at-

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tempt to go to shore under the order given. The same instruction, after declaring that if Edmund was drowned while in the employment of the defendants, in and on the boat, they as the owners of the boat, are responsible for ordinary neglect or want of care or imprudent management, proceeds to say, "and if they (the jury,) believe that the Captain and officers of said boat did not use ordinary care and good management of said boy, Edmund, in consequence of which he was drowned, they ought to find for the plaintiff," &c. This instruction did not, perhaps, present any definite idea to the jury by the phrase "ordinary care." But it required not only ordinary care of Edmund, but also good management of him, to save the defendants from liability. Good management in addition to ordinary care, the law does not require. And although the two phrases may, perhaps, have been intended to mean the same thing, the latter was probably understood as adding something to the effect of the former.

An instruction which required the jury to infer good management of the boat, as well as ordinary care of the slave, was misleading, as the two were not at all connected.

Taking the whole instruction together, the jury may have supposed, and probably did infer that the question of ordinary neglect in the management of the boat, as well as the care of Edmund, was before them, and that if they believed that the boat was improperly run upon the bar, or improperly navigated without a yawl, and that if this had not been done Edmund would not have been drowned, the defendants as owners were liable. And from the latter part of the instruction, they may have inferred that something more than ordinary care, viz: good management of Edmund was required. If this erroneous tendency of the instruction were clearly and certainly obviated by any other instruction given on the trial, and if some definite idea of what the duty of ordinary care or diligence in regard to Edmund, required or meant in reference to the particular circumstances had been conveyed to the jury, the error which we have noticed might not have been prejudicial, and the verdict might have been different. But although several of the instructions given, on motion of the defendants, lay down the law of the case correctly, it is done by the use of general terms, which do not supply the defect, nor even the error of

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SWIGERT, &c. vs GRAHAM.

that which had been given for the plaintiff. And the definition of ordinary care, given in one of these instructions, seems itself to refer rather to the management of the boat than of Edmund. Two of the instructions asked for by the defendants seem to have been properly designed, and although not entirely accurate, the overruling of them without giving others of similar effect, probably tended to confirm the inference from the instruction given for the plaintiff.

The first of these instructions is to the effect that if Edmund was one of the crew, and lost his life in the discharge of the usual service or employment of a hand on the boat, the defendants are not liable. But the particular service in which one of the crew loses his life, may be one of extraordinary hazard, though coming by usage within the range of his duties as a hand. And if so, the mere fact of its being in this sense the usual service of a hand, would not be conclusive, as already shown. The Court might perhaps have assumed that there was no extraordinary hazard in the particular service, and no circumstance which should have prevented Edmund being ordered to it. But we cannot say the Judge was bound to give an instruction which was based upon such an assumption. And yet the refusal to give it in a case where there was no doubt as to the fact, might lead the jury to suppose that although Edmund lost his life in a service appropriate to his station, and not attended with hazard, the defendants were liable.

The other instruction referred to is, "that the hirer of a slave is not bound by law in giving his orders to the slave to perform the labor he is engaged to perform, to go further than to give the orders in the usual way. He is not bound to follow the slave to see that the order is executed either with prudence or diligence by the slave." If the first clause of this instruction had been qualified by adding as a condition, "unless there be some peculiar circumstance known to him requiring caution in the particular case," we think the whole would have been free from objection. But the same observations apply to this as to the other instruction just stated, and we cannot say

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the refusal to give it as asked was erroneous, though it may have tended to mislead the jury.

The instruction, that if Edmund had reached a place of safety, and was drowned in consequence of turning back to rescue another, the defendants were not liable, was correct. As to the residue of the case as now appearing, we think it is covered by the following proposition: That if in the condition in which the boat was, it was proper to send the hands to the shore for the flat boat, though they might have to go through the water, and if Edmund, in the station in which he was employed was liable to perform that duty with others, and if with his knowledge of the bar, the order to go to shore and bring the flat, as given and understood, could have been executed by him so far as he was concerned, with the effect intended, and without hazard, and if there was nothing in his situation known to the officer who ordered or permitted Edmund to go which required that he should be excepted from the order or prohibited from going; and if his death was occasioned by his departing from the bar into the deep water of his own choice, without the orders of the defendants' agents who were entitled to control him, the defendants are not liable for the loss, unless their said agents knew of such departure from the bar in time to have prevented it, and had reason to believe that it was attended with extraordinary hazard to Edmund from want of skill in swimming or the like personal cause, and might have prevented it, but did not; or unless, after they were actually apprised that he was drowning, they might have saved him, but did not use the means within their power for that purpose.

In our view of the instructions, they do not place the liability of the defendants upon these nor upon proper grounds, and therefore we cannot say that the verdict establishes the facts on which the plaintiff's right of recovery depends. Wherefore, without deciding whether the evidence would have authorized the finding of those facts, and being satisfied that there was no error in granting the new trial after the first verdict, and that the opinions of the Court giving and refusing instructions on the last trial were misleading in their tendency, the judg-

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NELSON'S EX'RS. vs NELSON.

ment is reversed, and the cause remanded for a new trial in conformity with the principles of this opinion.

Cates & Lindsey and Harlan & Craddock for plaintiffs; *Hewitt and Morehead & Reed* for defendant.

CHANCERY.

Case 159.

Nelson's Executors *vs* Nelson, &c.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Wills. Mistakes.

October 8. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The contents of John Nelson's will.

JOHN NELSON, by his last will, dated in March, 1843, and admitted to record in October, 1845, first gives all his estate to his four lawful children and his illegitimate daughter Charlotte, in the following manner, and after reciting that he had given to each of his four lawful children about the time of their marriage, about $3,000, as to which he considers them equal, proceeds substantially as follows: "And having given since that time, and principally within the last five years, to James Nelson, my first child, property, money, &c., which added to the $3,000, I consider worth the sum of $16,991; and having given within the same period, to S. V. B., my second child, property, money, &c., which added to the $3,000, I consider worth the sum of $6,632; and having given within the same period to David, my third child, property, money, &c., which added, &c., I consider worth $14,260; and to M. T., my fourth child, property, money, &c., which added, &c., I consider worth $12,300; and being prayerfully desirous of treating my four lawful children upon terms of perfect equality, that is, to give to one just as much of my estate as I give to the other, I do give and bequeath to said S. V. B. and her heirs, not only a sum which added to what I have already given her, will amount to the sum of $16,991, the sum already given to the said James, but a sum which will place her on as good a footing as she would be had I given to her the sum of $10,359 at the time of making this will, which sum was then justly due her, and which shall be determined by my

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executors." The testator then gives to David and his heirs, not only a sum which added to that which had already been given, would amount to $16,991, the sum already given to James, but a sum which will place him on as good a footing as if he had given him the sum of $2,731 at the date of the will, &c. And in the same manner he gives to M. T. and her heirs, not only a sum which added to that already given, would amount to $16,991, the sum already given to James, but a sum which would place her on the same footing as if he had given her the sum of $4,691 at the date of the will. The will then provides that any future advances to either of his children, shall be disposed of with reference to the basis thus laid, and so as to produce equality on that basis; and after a small bequest to his illegitimate daughter Charlotte, requires that after the several sums that may remain due as above to the said Sarah, David and Mary and their heirs, and all other just debts are paid and the sum or sums that may be due said Charlotte are provided for, the remainder of his estate shall be equally divided between his four lawful children and their heirs. A codicil made in January, 1845, gives to his illegitimate daughter the sum of $408, instead of the sums given to her in the will, so that the will, so far as it was operative at his death, amounted to nothing more than a statement of the advances made to each of his four lawful children, and of the manner in which the desired equality should be produced. This is to be done by first paying to each of the three youngest children a specified sum, which is the difference between the amount stated to have been advanced to that child, and the amount stated to have been advanced to James, the eldest, and also such addition as would equalize the amount at the date of the will. And after payment of these sums and all other debts and the single additional legacy, the residue is to be equally divided between the four children.

This equal distribution after the ascertainment and equalization of the advances, the law itself would make. So that as between those who take under the will as distinct from the codicil, the whole purpose of the testator seems to have been to settle the amount of the advances

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NELSON'S EX'RS. vs NELSON.

and the time of equalization. And the will provides by its last clause, that if any of the testator's children or their heirs, shall sue him or his estate, except for the sums above mentioned, the same should receive no part of his estate. Upon the face of the will the testator intended to secure what he considered equality among his children, but he intended to secure it by the charges and mode of equalization contained in the will; and it seems to be the prevailing object and character of the will to fix beyond question and beyond litigation, the amounts advanced to each of his four children, and the amount to be paid to each for producing the intended equality. This adjustment of advances made, and of balances to be paid for equalizing them, is the essential part if not the whole of the will. Is a Court of equity authorized to interfere with this adjustment, to alter the entire frame and effect of the will, and to remodel every devise on the ground that the testator was mistaken in the statement of the sum advanced to James, to which all the balance refer, and on which every bequest or devise is founded? Or can he enlarge or diminish the sum given to any one of the children on the ground of a mistake in the statement of the sum advanced to that child, and of the sum due to make up the equalization? If this can be done, what must be the character and quantum of evidence to prove the statements of the will to be incorrect? And how is it to be further proved that they were made by the testator in ignorance of the truth? And if all this be satisfactorily proved, must it be assumed that if the testator had not been ignorant of the truth, he would have made different dispositions of his estate, and will that assumption authorize the Chancellor to make such disposition of it as he presumes the testator would have made had he not been ignorant? These questions arise upon the bill of James Nelson, charging that the sum stated to have been advanced to him, exceeds the true sum by some five or six thousand dollars, and on the cross bill of David Nelson's heirs, making a similar charge with respect to the sum stated to have been advanced to said David; and on the decree of the Chancellor determining that an excess of $2,621 in the sum charged in the will against

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James Nelson, and an excess of $490 in the charge against David, had been sufficiently established by the proof, and directing a settlement in which these errors should be corrected by charging James Nelson with $14,370 instead of $16,991, and making the other devisees equal to him in the first named sum only, before a division, and charging David with $13,770, instead of $14,260.

The will, as has been seen, makes no reference to the items composing the several sums charged as advancements, nor to any book or paper containing them. But it appears that a statement of accounts against each devisee, had been made out shortly before the date of the will, and as a preparation for it, and although not referred to in the will, it is verified by the signature of the testator to a memorandum annexed in the following words: "The preceding accounts made out by my direction, viz: against James Nelson for $16,991, against David Nelson for $14,260, against Mary Tracy for $12,300, against Sarah Van Buskirk for $6,632, are correct and true, and are the sums named in my will as already given to them. January 22d, 1843." The accounts referred to consist of but few items, several of which in the cases of James and David, are evidently the results of particulars not expressed. The principal items objected to in the account of James are these, "To cash balance on account of purchase of your farm, $2,806." "To cash left with you at Tully, (1,230) less ($65,) your account, $1,165." "To logs, wood, sawed lumber, &c. &c. at Tully, $640." "To cash spent for you in building mill at Tully and in various other ways, $2,000." The two last items are also contained in the account against David, and are the principal charges objected to in that account.

Assuming, as we think may be safely done, that the sums stated in the will were taken from these accounts and include the items just specified; and conceding that proof of a mistake in the aggregate of these accounts, will prove a mistake in the will, and that satisfactory proof of such mistake would authorize the Court to correct it in the practical execution of the will, our reflections on this case and on others which might come within

Where the object of a testator as expressed seems to have been to distribute his estate equally amongst his children, including advances made, and he fixes the prices of the property given, or the a-

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mount of the advances made, the Chancellor has no power to alter the accounts so fixed by the testator as the basis of equalization, by placing a different value upon the advancements than that made by the testator, unless there be evidence of fraud.

the principle thus assumed, have brought us to the conclusion, that if any proof can be deemed sufficient for the purposes mentioned, it must be such as leaving no room for doubt or opposing inference, actually demonstrates the particular mistake and accounts for it, or at least establishes the conclusion that it was adopted in ignorance of the truth.

These accounts were obviously made out for the very purpose of demonstrating, not perhaps to the world, but to the particular individuals concerned, and who might be expected to understand them, the justice of the will. They may be presumed to have been made out or dictated or adopted by the testator under the influence of that prayerful desire for effecting equality among his children which is professed in the will; and their results are adopted in the will as the rule and basis of the intended equality. The propriety and justice of the charges, in view of the equality intended, were to some extent at least, dependent on the testator's own opinion or will, and the facts to which they relate, may have been peculiarly within the knowledge of himself and the particular individual against whom the charges were made. It was only necessary to the justice of the charges, that with a full knowledge of the facts, they should have been allowable *in foro conscientia*. It was only necessary, in order to sustain them in the will, that they should have been knowingly made, with a knowledge of their import and of the facts on which they were founded. There is no rule of justice applicable to the subject, but the will or opinion of the testator himself, acting without mistake of fact. It is not necessary that the correctness of the charge either in point of justice or of fact, should be admitted by the person to be affected by it or by others, nor that it should be proved or even provable. It is not necessary to sustain the charge in the will, that the particulars on which it is founded, should be stated there or elsewhere, for the inspection of others; and if so stated, it can be subject to no rule as to the form or specification of items. If unintelligible to others, it may be understood by the immediate parties. And though it be intelligible to the testator alone, if he understands it and is

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satisfied with it, knowing the facts, no one has a right to reform it so as to affect the disposition of his estate which he has based upon it.

If the testator was not competent to understand the accounts which formed the basis and essence of his will, he was not competent to make the will, which really does no more than give effect to those accounts, and the objection should prevail against the whole will. If he was competent to understand the accounts and to make the will, the earnest desire to produce perfect equality in the distribution of his estate among his children, must be presumed to have been directed to the careful ascertainment of the correctness of the accounts and statements of advancements previously made, as being absolutely essential to the desired equality. And as, supposing him to have been competent, he must, with his knowledge of the facts to which the accounts refer, have been enabled without any extraordinary vigilance, to have detected any substantive error or mistake in the accounts, his repeated verification of their correctness, by the memorandum annexed to them, by their subsequent adoption into his will, by the repeated reiteration therein of the sums stated as advancements, by the particular statement in each case, of the sum necessary for equalization, and his failure for about two years which elapsed before his death, to make any correction or alteration, furnish evidence of the correctness of the charges, so far as their correctness depends either upon the truth of facts involved, or the justice in his opinion of the charges founded on them, which in our opinion is not only not overcome by any opposing evidence in the record, but which we do not perceive any effectual mode of overcoming, except by proof of fraud and imposition in making up the items of account, which if it did not prove incompetency, would like it, go to the entire will.

To enter more into detail: the Chancellor taking up the item of "$2,806, balance on account of purchase of your farm," takes from an account sent by the testator to his son James, about two years before the date of the will, and which would seem to be a full account, all the items of debit and credit which are referable to the farm

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NELSON'S EX'RS. vs NELSON.

transaction, and bringing in a charge against James of $1,000 omitted in that account, but certainly belonging to that transaction, finds a balance less by about $1,600 than the balance charged in the account now in question. It being certain that the first account did not include all the items (for the item of $1,000 was omitted.) That account even as corrected by the addition of the item of $1,000 shown to have been omitted, furnishes no conclusive, nor even satisfactory test of the correctness of the last amount, unless it be assumed that it is incumbent on those who would sustain the last charge, to prove its correctness by showing the items included in it. It is not known what charges the testator may have finally deemed applicable to the farm transaction, or intelligible to his son under that head. And even the probability of an overcharge, which might be sufficient in an ordinary case of dealing between individuals, is not sufficient here. It was not incumbent on the executors or devisees to prove the account, and certainly not, to show that the heads under which the charges were made, embraced only such things as were properly described in the charge.

The item of $1,165 is also reduced, upon proof showing that the testator had received several hundred dollars, the proceeds of the money left with James at Tully, and had appropriated it in purchasing adjacent lands, afterwards conveyed with the will to James and David. But there is no proof of the circumstance under which this sum was received, nor whether compensation may not have been made for it. And if the testator was competent, and desirous of doing justice, every allowable presumption should be indulged, rather than suppose that this charge should have been plainly made, when the testator had in fact received back a large part of the money.

A third charge, the item of $640 for logs, &c. at Tully, was reduced in the accounts both of James and David, upon proof that the logs, lumber, &c. at Tully, at a particular time were sold for a small sum, which was divided between James and David, and were not worth more. But it is not shown that they had not received the benefit

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of other logs, lumber, &c., or of other work of the mill, which might have been referred to in the charge. The probability is that they had.

No other charges were reduced. But it is alledged for error, that the charge of $2,000 in each of these accounts "for cash spent for you in building mill and in various other ways," was not expunged or reduced. Upon this charge, however, there is no direct proof. But if it is to be inferred that the whole of it referred to expenses in building the mill, which was afterwards conveyed to James and David as an advancement at the sum of $12,000, of which $6,000 is charged to each in this account, it would only prove that the testator considered the mill as being worth $16,000, and that he believed it just to make the additional charge in equalizing the distribution of his estate. Whether if it were so, he was right or not, we need not decide. We should not even upon the hypothesis assumed for the explanation of this charge, nor upon any other ground appearing, consider the Court as authorized to expunge it.

We need only add, that the same principles which apply to the attempt to reduce the charge against James and David, apply also to the attempt on the part of the executors to increase them. And that there is no sufficient evidence of fraud or imposition in making up the accounts or the will, to authorize the interposition of the Court of equity, as asked for in this case.

Wherefore, without deciding whether under any state of evidence, the charges against James and David Nelson, in the will of John Nelson, might not be corrected, the decree making the corrections as above noticed, is reversed, and the cause remanded, with directions to dismiss the bill of James Nelson, and cross bill of David Nelson's heirs, and for further proceedings on the bill of the executors not inconsistent with this opinion.

Fry and Loughborough for appellants; *Pirtle & Speed* for appellee.

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EJECTMENT. **Giltner, &c. *vs* Trustees of Carrollton.**

Case 160. APPEAL FROM THE CARROLL CIRCUIT.

Practice in suits at law. Towns. Trustees.

October 8 JUDGE BIBB delivered the opinion of the Court.

Case stated. THIS was an ejectment by the Trustees of Carrollton, to recover a strip of land claimed to be within the bounds of the town, and to be a common or public ground belonging to it. The first amended demises were filed before the defendants appeared and plead.

It is not error to permit a declaration in ejectment to be amended by adding a demise in the name of the same lessors for the same land before appearance; nor to permit an amendment after appearance, if no other title but that relied upon in the original demise is to be offered in evidence.

The lessors were the same as in the original declaration, and the demises for same land. The amendment consisted merely in laying one demise in the names of part of the lessors, and the other in the names of the residue. The second amendment in the name of Cave Johnson, who it appears, was the survivor of the trustees appointed by the Legislature in 1794, was filed on the same day the tenants in possession were made defendants. In the order permitting the amendment to be filed, it is stated that no title shall be shown under it, except the right or title, which might be in the lessor as trustee.

Under the circumstances, it seems to us that there was no error in permitting either amendment to be filed.

The instructions which the Court below gave the jury, embrace substantially the law of the case.

It sufficiently appears from the deed of Peachy, the plat of the town, and the act of the Legislature, as stated by the Court, that the town was bounded on the west by the Kentucky river, and embraced the land in contest. The inference is also authorized from the plat, that the land in contest was intended for public use as a common for the use of the town, for affording free access to the river for lading and unlading boats, &c. Whether the act of 1799 divested the trustees of 1794, of the title, and vested it in the trustees appointed by the former act, it is not material to decide, as in either event the title is

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in the lessors of the plaintiff. If the title remained in the trustees of 1794, the plaintiff showed title in the lessor, Johnson. If it vested in the trustees appointed in 1799, then he showed title in the heirs of Bullock, the survivor of that set of trustees.

The trustees of towns have no authority to convey the streets, alleys and public grounds, and such conveyances pass no title: (1 *Marshall*, 9; 8 *Dana*, 50; 3 *B. Monroe*, 437.)

The conveyance by Johnson to the defendants or those under whom they claim, upon the supposition that the title remained in him, was void. Trustees of towns have no authority to convey the streets, alleys or public grounds and such conveyances are absolutely void as decided by this Court in *Buckner* vs *Trustees of Augusta*, (1 *Marshall*, 9;) *Kennedy's heirs* vs *Town of Covington*, (8 *Dana*, 50,) and *Trustees of Augusta* vs *Perkins*, (3 *B. Monroe*, 437.)

The objection to the statement of witnesses that the land in contest had been considered and used as public ground, becomes unimportant in the view which we have taken, even if otherwise it would have been available. But we are inclined to think there was no error in refusing to exclude such statements in any view of the case.

In regard to the objection that the verdict is against the evidence, we are not satisfied that the judgment ought, upon that ground, to be disturbed.

Perceiving no error to the prejudice of the appellants, the judgment is, therefore, affirmed.

Hord, Robertson and Hewitt for appellants; *Loughborough* for appellees.

Wickliffe *vs* Bascom and others.

CHANCERY.

APPEAL FROM THE BATH CIRCUIT.

Case 161.

Towns. Executions. Sheriffs.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

October 9.

The establishment of the town of Owingsville recognized.

IN 1811, the town of Owingsville, in Bath county, was established on the lands of Thomas D. Owings and R. Menifee, and on their motion, by order of the County Court of said county, bonds were executed as required by the act of 1796. The order states that due advertise-

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ment was proved, and a plan of the proposed town returned and ordered to be recorded. Trustees were also named in the order, which was properly made under the statute. The town has existed in fact, to this time, and is and has been the seat of justice of Bath county. There has been, of course, a succession of trustees, more or less regular, to the present time, and every reasonable presumption will be indulged in favor of the sufficiency of the proceedings by which the town was originally established.

Decrees against Owings for sale of part of the town lots by the trustees, their sale, &c.

It appears that 168¼ acres of the land condemned for the town, was claimed by Owings, who afterwards received a conveyance of the tract of 2,908 acres, which includes the 168¼ acres on which it was established, and no one seems to have asserted an opposing claim to the 168¼ acres. It also appears that the trustees had not laid off into lots and sold more than 30 or 40 acres of the 168¼, until the year 1836; when under two decrees of the Bath Circuit Court, directing a sale by the trustees, if they should think it proper to make sale, and if not, by a commissioner, of so much of the unsold part of the town as might be sufficient to satisfy the demands set up by the complainants against Owings, as evidenced by judgments and executions thereon returned, "no property," the trustees proceeded to sell the residue, or a large part thereof, in lots, taking bonds payable to the attaching complainants. Upon the return of their report of sales, the Court decreed that deeds should be made and possession delivered to the purchasers, which was done.

The statement of Wickliffe's bill filed in 1837.

The present bill was filed in 1837, by Wickliffe, claiming that he and those under whom he claims, were, before the bills in the cases above referred to took effect as attachments, invested with whatever interest Owings had in the unsold portion of the 168¼ acres, and impeaching the decree and sale as erroneous and fraudulent. The trustees of the town, the complainants in the two suits, Bascom and others who had purchased the lots at the sale, and also various persons under whom Wickliffe claimed an interest in the title of Owings, were made parties, and the bill prayed for special and general relief. Upon the hearing the bill was dismissed; and the case has

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been brought to this Court on a record of more than 900 pages, consisting, in addition to the pleadings, almost entirely of the documents of title and the judicial proceedings under which Wickliffe claims.

If the decision of the Circuit Court be right, this Court will not reverse, though the reason given by the Circuit Court may be wrong.

Among the documents of title relied on by Wickliffe, are an article of compromise between himself and Bascom, dated two days after the sale of the lots under the decree, and a deed from Bascom to Wickliffe, made about one year later, in execution of the compromise, and after Bascom and other purchasers had been invested with the title to the lots. In both of these instruments Bascom acts not only for himself but also as the attorney in fact of Thomas D. Owings, both in his own right and as administrator with the will annexed, of T. J. Owings, deceased; and the deed purports to convey several tracts of land or the grantor's interest therein. One question greatly litigated in the case is, whether this compromise and deed transferred the interest of Bascom in the lots sold under the decrees. But we deem it unnecessary to decide this question, for so far as Wickliffe claims under Bascom he cannot impeach the decree which is the foundation of Bascom's title; and his claim being founded on a deed from Bascom, who had the legal title by conveyance from the trustees of Owingsville, his remedy at law is complete, if the deed covers the lots, and if it does not, he has no right under Bascom, for the deed is certainly as extensive as the compromise. And although the Circuit Court seems to have been of opinion that the deed does not embrace these lots, and to have dismissed the bill on that ground, at least in part, yet as there is no decree for altering the terms or effect of the deed, and as the reason which we have already given was a sufficient and proper ground for dismissing the bill so far as Bascom was concerned, the reason given by the Court below whether right or wrong, is not conclusive, and does not require revision by this Court in the present case. The dismissal of the bill is not a bar to the legal remedy upon the deed, if there be one, because the Court had no jurisdiction to give Wickliffe relief upon the deed, and any other reason given is not conclusive.

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WICKLIFFE vs BASCOM, &c.

One acquiring title under a party to a suit, is bound by a decree made in that suit.

As T. D. Owings, whose interest Wickliffe also claims by the same deed, was a party to the suit and decrees, Wickliffe, if he acquired any interest from him in the subject of the suit, was bound by the decrees as fully as Owings himself was. But as whatever interest Owings had either in the lots or their proceeds, was completely divested by the decree and sale and delivery of possession, we do not perceive that Wickliffe acquired or could acquire, any interest in the subject of the suit, from T. D. Owings, by a deed conveying as this does, among other tracts, the tract of 2,908 acres described as patented to G. N. and conveyed to Owings, though with the additional words, "it being the tract of land including the town of Owingsville." Owings had not, either at the date of the deed or of the compromise, any interest in the lots or their proceeds, which could pass by this conveyance. No reference is made in the deed to any such interest, and Wickliffe did not acquire by it the right to prosecute either a writ of error or a bill of review in the name of Owings, and much less a right in his own name, to claim the lots or their proceeds. The same deed also professes to convey the interest of T. J. Owings in the tract of 2,908 acres, described as above. Whatever interest T. J Owings had was acquired under executions against T. D. Owings, in virtue of which his title in the tract of 2,908 acres had been sold before the attachment bills took effect. But the question is whether any interest in the lots or land now in question, passed under the execution sale at which T. J. Owings purchased; and as we perceive nothing which can give to this purchase any more direct bearing on the town or greater effect in passing any land or interest in the town than the other execution purchasers under which Wickliffe claims should have, we shall consider the question of the interest acquired under these sales under one view.

In addition to the claim under the purchase of T. J. Owings, Wickliffe claims the interest acquired by Luke Tiernan, who purchased in 1827, under his own execution, and that of Comegys & Preshons against T. D. Owings, &c., and the interest acquired by Ellicott and Meredith, who purchased under the execution of Smith

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against Owings, &c. in 1829, and also any interest which James Suddith may have acquired by a purchase of the right to redeem the tract of 2,908 acres within twelve months from the purchase of T. J. Owings or of others. But as this right of redemption was never exercised, that interest had ceased absolutely, long before Wickliffe obtained a deed from Suddith. These levies and sales were made in general terms, designating the subject of the levy as the tract or as the estate or right, title and interest of Owings in the tract of 2,908 acres, which in the case of Tiernan's purchase and that of Ellicott and Meredith, was further described as having been patented to George Nicholas, and conveyed by, &c. to T. D. Owings, with the additional words, "being the tract including the town of Owingsville." It does not appear that in any of these cases there was either in the levy or sale or deed to the purchaser, a particular designation of any interest in the town of Owingsville, or in any lots or parcels of land therein. Nor does it appear that Owings surrendered any such interest to these executions or any of them, or that he made any surrender by which the levies might be understood to embrace any interest which they would not otherwise reach. There was in fact, no reference to the town of Owingsville, in any of these levies, sales or deeds except in describing the tract levied on as being the tract including the town of Owingsville.

From this statement of facts, it is entirely clear: 1st. That unless Owings had an interest in this unsold part of the town, which was by law subject to levy and sale under execution as land or an interest in land, no interest whatever passed from him to the purchasers, in or to the said unsold part of the town, by virtue of any or all of these executions, levies, sales and deeds. And 2d. That if he had any such interest, the levies, sales and officer's deeds, making no reference thereto, but merely referring to his interest, that is, his legally vendible interest in the tract of 2,908 acres, described either by boundary or as patented, &c., and as being the tract including the town of Owingsville did not pass, and were not intended or understood to pass any such interest.

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WICKLIFFE vs BASCOM, &c.

After a town has been regularly established, the original proprietor has not such interest in the lots as is the subject of levy and sale under execution without his consent. The legal title becomes vested in the trustees of the town.

The first of these propositions being too obvious to admit of question, the only enquiry under that proposition is, whether Owings had any such interest, and we proceed to enquire what interest he had or could have had in the unsold part of the town. By the legal establishment of the town, the title vested by law in the trustees to the extent of the boundary designated in the plan according to which it was established; and the subsequent conveyance to Owings from the representative of the patentee, if effectual, enured to the benefit of the trustees to the same extent. Owings as the proprietor who had established the town on his land, had no right against the trustees, except that of receiving the proceeds of sales of the lots, and the right of having timely and fair sales. The contingency of there being no sale of lots, and no town in fact, had not happened, and its consequences need not be considered. To the extent that lots had been sold by the trustees, there was no reversionary interest in Owings, even upon the unsupposable contingency of the cessation of the town. His title to that extent at least, had passed from him absolutely. And the purchasers having paid for and improved their lots, as part of the town established by law, to the extent of the designated boundary, and the title being in the trustees to that extent, for the purposes of a town, it is by no means certain that the original proprietor would be entitled, without the consent of these new proprietors, or at least of the trustees, to a resumption or reconveyance of any portion of the town tract, on the ground of its being unnecessary for the purposes of the town. If there be any such right, it is equitable only, and is a right to appeal to the sound discretion of the Chancellor for a restoration of the excess, on the ground that he had improvidently or in mistake, appropriated too much land for the town. Whether the Chancellor would have power to grant the relief desired, or to entertain the question, need not be considered, as the right of making the appeal to him, if an established one, would be purely equitable, and not a legal right subject to execution. The right to appeal to the trustees themselves for their consent, or for a conveyance, is of course not a legal title in the land.

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And the right to demand and receive from them the proceeds of sale of lots has been determined not to be of that nature, and is certainly not liable to seizure and sale as an interest in land.

But it is urged that Owings was in possession of this unsold part of the town, and that this possession was itself a legal interest subject to levy and sale. If this be so, and if the possession were in fact levied on and sold, it certainly never was delivered under such sale, but was absolutely terminated by delivery to the purchasers from the trustees under the decrees before mentioned. And being moreover a possession presumably held under them and by their sufferance, it could have presented no obstacle to any sale by them in their character as trustees, whether held by Owings himself or by one claiming under him. It is not shown that there was any adverse possession by which a title was acquired as against the trustees. And an actual levy and sale and delivery of such possession as there was, would not if made, have given to the purchaser any right to question the decree or the actings of the trustees under it. But this point is immaterial, as Owings, who remained in possession, was a party to the decrees, and the possession was actually transferred in obedience to them. Without pushing this enquiry further, we are entirely satisfied that Owings had at most nothing more than a bare possession by sufferance, of this unsold part of the town, with the right to the proceeds of its sale whenever sold by the trustees, and with some undefinable right of having this unsold land, or some portion of it, relieved from his appropriation of it as a part of the town, and that none of these rights were subject to seizure and sale under the execution, unless the bare possession might be. And as this possession whether levied on and sold or not, remained in Owings until transferred under the decrees, it is clear that if any interest in this part of the town was acquired under these execution sales, being absolutely subject to the decrees, it ceased with the sale and delivery of possession made under them, and certainly is unavailable to Wickliffe as the vendee from the purchasers.

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WICKLIFFE vs BASCOM, &c.

This conclusion would render the second proposition above stated in reference to these execution sales, of no consequence in the case, were it not that the transactions and documents by which Wickliffe claims title or interest from other sources, being founded on and plainly referring to the execution sales, which have been considered, it becomes necessary to ascertain with reference to this unsold part of the town, the extent of those sales as made, or intended or understood to have been made, in order to ascertain whether Wickliffe has acquired any interest in this part of the town from these other sources.

The possession, which, if subject to execution, was the only interest that was subject, did not pass, and could not have been understood to pass by the sales. This is demonstrated by the fact. Was it in fact levied on, or was any other interest of Owings within the town levied on, or supposed to have been levied on and sold? For the solution of these questions, the record furnishes no facts in addition to those already stated, except the prices bid at the several sales, and in some instances, the valuation by valuers of the land or interest levied on. The valuation, however, is not more specific in designating the particular subject, than the levies as returned by the officer, and the prices bid fall far below the valuations. The question is to be determined by construction of the language of the returns, in reference to the duties of the officer and the nature of the subject, or interest as to which the question is made.

It is the duty of an officer levying on land to designate the nature of the right which he has levied upon, and which he offers for sale: (8 *Dana*, 199.)

It was probably uncertain what interest Owings had in the tract of 2,908 acres. The title to the town, however, had passed from him by public and notorious act. The reference to the town in describing the tract, shows that it was known to the officer. This reference was made to identify the tract as being the one which includes the town, and not to indicate that the town itself was intended to be levied on and sold. It is the duty of an officer levying an execution, to designate as far as may be, the nature of the interest to be sold, and if there be several adjoining parcels held by the same debtor, which might as to their extent, be described by one boundary, still if there be a substantial difference in the interest which he

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has in each, as if he be mortgagor of one, tenant in common of another, and tenant for life of the third, it is the duty of the officer to make the proper discrimination and not by a sale *en masse*, to sacrifice the whole: *Daugherty* vs *Lynthicum*, (8 *Dana*, 199.) In regard to town property, the law and usage has established the practice of selling lots separately, and they are usually sold and conveyed by number. To this practice the record before us shows that the officer who levied most of these executions had conformed, in regard to lots in the same town, sold under executions between the same parties, and in which as may be presumed, Owings had an interest certainly subject to execution. Whether he had any such interest in the unsold part of the town, was, as has been seen, extremely uncertain. And if he had, this interest was of a peculiar nature, requiring discrimination, if the officer intended to sell it as well as the interest in the tract outside of the town. The levy and sale as made, not only makes no such discrimination, but having been made in general terms, referring to the town only as descriptive of the tract, they furnish no presumption that the officer intended to sell any interest in the town. There is, indeed, no presumption that knowing the title to the 168¼ acres hed been vested in the trustees, and that the interior portion of the larger tract had been condemned and appropriated as a town, he supposed Owings had any interest in the unsold portion, which could be levied on and sold. And as the presumption is, that if he had supposed there was such an interest, and had intended to levy on and sell it, he would have designated it at least so far as to call it the interest of Owings in the unsold part of Owingsville, the fair inference from all these considerations is, that he neither intended to levy on such interest nor was understood by himself or others to have done it. It might be assumed that ordinary bidders, though standing in the midst of the town and bidding for a large tract, or for the interest of Owings in a large tract, described as being the tract which included the town, but without reference to any interest in the town, would not have supposed that the officer was selling the town or any part of it. Such sales in mass, under vague and general

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WICKLIFFE vs BASCOM, &c.

terms, are, when made by public officers under execution, contrary to the objects of the law, and when sustainable at all, should rather be restricted to their narrowest than extended to their broadest import. At any rate they should receive such reasonable construction and effect as would most probably comport with the intention of those concerned, and with the understanding of the parties and of the public at the time. The remaining source of title or claim arose in the following manner:

The levy of an execution upon a large tract of land of which part had been laid off into town lots and vested in trustees, and describing the land, and selling it as the tract upon which the town is established, or as including the town, does not import a sale of the proprietor's interest in the town.

It appears that in 1824, Owings conveyed to six persons, who were bound for him in various debts, a large property in trust or mortgage for their indemnity. The deed conveys several tracts by description, and also a house and lot in Mountsterling, "and all other lands and lots held or claimed, in law or in equity, by the said Owings in the State of Kentucky." A large portion of the lands conveyed by this deed having been purchased by Tiernan under his executions, and the judgment of Smith for more than $25,000, for which some of the mortgagees were bound, being still unsatisfied, Wickliffe, the attorney of Tiernan and also of Ellicott and Meredith, who as trustees of Smith, had control of his judgment, having caused the execution on it to be levied on the lands purchased by Tiernan, made an arrangement of compromise with the mortgagees, by which Wickliffe, for Ellicott and Meredith, was to purchase under Smith's executions, all of the land which Tiernan had bought, (on which Smith's executions had been levied,) and was to bid therefor the whole amount of Smith's executions; in consideration of which the mortgagees were to pay $10,500 to Tiernan, in effect to quiet or remove his title, and were also to release to Ellicott and Meredith to the extent of the lands above referred to; and other persons, among whom was J. Suddith, who had also purchased some of the same lands, were in like manner to release to Ellicott and Meredith. It has already been seen that the unsold part of the town of Owingsville was not levied on under any of these executions; and the sales having been made under Smith's executions, and Wickliffe having, as agreed on, bid for and purchased the lands, and the officer having conveyed them to Ellicott and Meredith,

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by deed describing the tract of 2,908 acres, in the manner already commented on, the mortgagees of Owings, in November 1829, only a few weeks after the date of the compromise, released and conveyed their interest as they had agreed to do. This deed recites the levy of Smith's executions and the purchase by Ellicott and Meredith, and the conveyance to them by the officer, of various tracts of land, and among them the tract of 2,908 acres, described as in the officer's deed, and as before stated, and reciting that they had agreed to terms of compromise, and that Wickliffe, as agent for Ellicott and Meredith, had agreed to bid for and receive the above described tracts of land in full discharge and satisfaction of the debt of Smith; it goes on in consideration of the premises, and particularly in consideration of the party of the second part receiving this release and the lands above described, in full discharge, &c., and in consideration of one dollar, &c., to grant, bargain, sell, release and convey all the right, title, interest, claim and demand which they, the mortgagees, have in and to the above described lands and premises, as derived under the mortgage or under the purchase of any person in trust for them, &c. They also agree to warrant the title so far as the same is vested in them as above described, as the true intent and meaning of this conveyance is for the party of the first part to release to the party, &c., all the right which they have as above described, in the said property.

However extensive may have been the scope and efficacy of the deed from Owings to his mortgagees in investing them with all the rights, legal or equitable, which he might then have had within the town of Owingsville or within the 168¼ acres of land, we are of opinion that the release or conveyance from said mortgagees to Ellicott and Meredith, is not more extensive than the purchases of Tiernan, and at any rate, not more extensive than the purchases under the executions of Smith, as provided for by the agreement of compromise, and referred to expressly in this deed; and as the sales under those executions did not include any portion of the unsold land or lots in the town of Owingsville, which were afterwards sold under the decrees above referred to, it follows that

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WICKLIFFE vs BASCOM, &c.

no such interest was conveyed by this deed, which is *not* only founded on the compromise and recites the purchases made in pursuance of it, but is evidently intended as a mere release of such title as the grantor had in and to the lands purchased by the grantees as described in the sales and deeds of the officer. Its terms import nothing more, and especially when construed as they should be, with reference to the recitals and consideration, which are stated for the purpose of showing the intent of the deed. There is nothing to show that the deed was intended or understood to go further. Then if the mortgagees might have complained of the decrees as having been rendered without making them parties, or of the sales as having been made unnecessarily, or at inadequate prices, or fraudulently, or of the proceeds having been decreed to others, and if they might, upon any of these grounds, have sought relief, still the interest, if they had any which might have been affected, remained in them so far as this deed was concerned, and not having been conveyed to Ellicott and Meredith, could not have passed to Wickliffe, as claiming from or through them. His bill to impeach the decrees and sales cannot, therefore, be maintained in virtue of any interest derived through them under this deed from the mortgagees of Owings. The decrees and conveyances by which Wickliffe has concentrated the titles of Tiernan and Smith, or Ellicott and Meredith in himself, have not and could not give greater extent or efficacy to those titles, or to the execution sales under which he claims. Whether the deed from Bascom is to be restrained in its construction and operation, so as to pass no interest in the town of Owingsville or the unsold part thereof, we need not, as already shown, decide in this case, as an affirmative conclusion would not authorize Wickliffe to impeach the decrees.

Wherefore, the decree is affirmed.

Morehead & Reed and Loughborough for appellant; *Apperson* for appellees.

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Flournoy *vs* Johnson & Tingley.

CHANCERY.

ERROR TO THE MCCRACKEN CIRCUIT.

Case 162.

Devises. Uses. Trusts. Chancery jurisdiction.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

October 11.

IT was in effect decided in the case of *Cosby* vs *Ferguson*, (3 *J. J. Marshall*, 264.) that a provision in a deed of trust for the benefit of a man and his family, is to be regarded as securing a benefit and interest to the family, which if the deed be valid, cannot be subjected to the debts of the husband, and that the benefit secured to him as distinct from that secured to his family, is the only interest which can be subjected. And as the trust created by the will of Jourdan Flournoy, for the "special use and benefit of his son William and his family, if he should have one," is if effectual at all, with regard to the benefit intended for the family, precisely of the same nature, it follows on the authority of the case referred to, that if the trust was effectual and subsisting at the time, no interest in the trust property, (slaves,) was subject to the execution of Johnson & Tingley against William Flournoy, except such as upon a fair estimate of the value of the benefit secured to him as compared with the value of the benefit secured to his family, would appear to be his proportional interest in the property.

Cosby vs *Ferguson*, (3 *J. J. Mar.* 264,) cited, and with approbation.

Assuming that this interest, partial and involved as it was, might be the subject of levy and sale under execution, it is obvious that a resort to a Court of equity for its ascertainment, would be appropriate if not absolutely necessary. And as a sale of it, or of whatever interest the defendant, William, might have in the slaves, or of the slaves themselves, under an execution against him, and without ascertaining his interest, would probably have occasioned a sacrifice, as well as a confusion of rights, and would have greatly embarrassed the trust for the benefit of the family; and as the trustees had no legal remedy for preventing a sale, even of the whole, be-

The interest of one of several *cestui que trusts*, may be properly decreed to be sold by the chancellor to pay the debts of such beneficiary.

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FLOURNOY vs JOHNSON & TINGLEY.

fore a division, and no legal remedy for partition, or ascertainment of the interest which might be sold, we think that if the trust were valid and subsisting, the Court of equity ought not to have dismissed the bill of the trustees, but should have proceeded to ascertain the interest of William Flournoy, and subjected it to sale, so far as necessary, in such manner as would make it available without injury to other interests secured by the trust.

A devise to a trustee in trust for the benefit of one "and his family if he should have one' is valid in both its branches, though it be contingent as to the family, as to whom it is an executory devise depending on a contingency which must happen within the life of a person in being, a springing or shifting use.

The devise in trust for the benefit of William, "and his family if he should have one," we think is valid in both its branches, though as to the family it is dependent of course on the contingency of there being one. As to the family, it is an executory or future devise, on a contingency which must happen if at all, within the life of William. It is in effect a devise of the benefit to William until he has a family, and then to him and his family, and is in the nature of a springing or shifting use, the family, when there shall be one, and as it shall increase, being entitled to an interest which may vary as the family increases. Whether before the marriage of William, the entire property thus devised might have been subjected to his debts, on the ground that he had then the entire benefit or interest, subject only to be partially divested on a contingency which might never happen, we need not decide. His family, since he has had one, has had a vested interest in the trust, which the testator in disposing of his own property had a right to give, and which is in equity entitled to protection while it subsists.

Trustees having the power to relinquish the entire estate in property to *cestui que trust* at discretion, will not be presumed to have done so, from the fact that they permitted *cestui que trust* to sell the property, (slaves) and pay the taxes, though he sold one, but without their approbation.

The will, however, subjects this interest to be defeated or determined, and the entire trust to be ended, by providing that if the trustees, or either of them, should become satisfied that he, (William,) has a suitable disposition to take care and manage his affairs, then they or either of them, are at liberty to convey and put him in possession of said slaves, to do as he may think proper with them. It is contended on the part of the execution creditors, that this had been done in substance, by allowing William to have the possession and ostensible control of the slaves or some of them, for several years before the levy of their execution, during which period he had sold one of them and had paid the taxes on others.

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We are of opinion, however, that the possession of the slaves for the use of himself and family, was a mode of enjoying the intended benefit not inconsistent with the trust; and as the revenue laws of that period did not require the owner of slaves (in contradistinction to the mere possessor,) to pay the taxes on them, and as the sale referred to was made without the knowledge of the trustees, and though acquiesced in, was disapproved, we think these circumstances do not furnish sufficient evidence of an intentional surrender of the slaves, or relinquishment of the trust under the authority given by the will, and especially as they continued from time to time to assert the contrary. It is true, that as the will, which was made and proved in Virginia, had never been recorded in Kentucky, the circumstances referred to were calculated to give to William Flournoy a credit founded on his supposed ownership of the slaves. But it takes five years possession to subject the property to the debts of the person in possession on this ground alone. Those to whom the provisions of the will were unknown, had no other evidence of his right but the possession, and those who knew the provisions of the will, had the means of knowing whether the trustees had relinquished the title.

Whether even five years possession of the slaves by William Flournoy, in the use of himself and family, would have defeated the interest of the family, and rendered the whole subject to his debts, we need not inquire. He had not had five years possession before the execution was levied, nor before the trustees by an action of replevin regained the possession, and the subject having been in litigation ever since, the question of right is not affected by the subsequent possession, as to which, however, the record gives little information.

We conclude, that as to the interest of William Flournoy's family, the trust was valid and subsisting when the execution was levied, and is so still. And as in consequence of the interest of William Flournoy being subject to his debts, and liable to execution, the action of replevin, if sustainable at all, was an inappropriate and inadequate remedy for the assertion of the right of the trustees, and their proper remedy is in equity, the non-

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FLOURNOY vs JOHNSON & TINGLEY.

suit or dismissal in the action of replevin is no bar to the granting of relief on their bill, which prays that a suitable provision out of the slaves be made for the wife and children of William Flournoy, and also for general relief. The appropriate relief would have been to ascertain and sell the interest of William Flournoy in the slaves, and to have decreed the trust valid as to the residue, as against the execution of Johnson and Tingley.

The Chancellor may decree the sale of the interest of one of several *cestui que trusts* in trust property, to pay debts, it is made subject by the statute of 1796. Sec. 13, (1 *Stat. Law*, 443.)

There is an intrinsic difficulty in ascertaining and separating the interest of the husband and father in property placed in trust for the use and benefit of himself and family. It is probably contrary to the intention of the donor or testator in this case, that there should be any such separation with a view to taking away any part of the property from the common use. But under the statute of 1796, Sec. 13, (1 *Stat. Law*, 443,) as heretofore construed, the interest of a *cestui que trust* in property held in trust for his benefit, as in this case, is subject to his debts as the legal estate would be if he held it. And when that interest is partial and undivided and unascertained, it becomes necessary to the operation of the statute in the case, that it should be ascertained as nearly as may be, so as not to do injustice to others. We suppose this may be done in the following manner: Having ascertained or assumed a sum sufficient for the comfortable support of the husband and family in common, ascertain in the best practicable mode, what portion of that sum would, in the ordinary course of expenditure, go to the support of the husband, and what portion to the residue of the family living in common, and whatever portion, as a third or a sixth, as thus ascertained, would go to the husband's support as one of the family, the same is his portion or the measure of his interest in the trust property, and the residue of the property is to be considered as held in trust for his family, exclusive of himself. His interest, or so much as is necessary, should be sold for payment of his debts, either before or after an actual partition, as may be most convenient or advantageous.

The mode by which to ascertain the interest of one of several *cestui que trusts* in trust property.

The decree is reversed and the cause remanded for further proceedings and decree, in conformity with this opinion.

Harlan & Craddock for plaintiff; *Husbands* for def'ts.

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De Lazardi, & Co. *vs* Hewitt, Allison, & Co.

CHANCERY.

Case 163.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Factors. Agents. Partners and Partnership.

October 11.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

DE LAZARDI & Co. of New Orleans, and Hewitt, Allison & Co. of Louisville, Kentucky, entered into an agreement in February, 1841, to purchase a large quantity of sugar, on joint account, to be sold by the latter in Louisville, free of charges and commissions, except actual expenses; the profits or losses to be equally shared. The sugar was purchased, shipped to Louisville, and there sold under this agreement. A general depression in business that season, operated adversely to the success of the adventure, and occasioned a considerable loss to the parties concerned. A large portion of the sugar having been sold on credit and some of the purchasers having failed, whereby the loss on the speculation was greatly increased, a contest has arisen among the parties in relation to the loss on the credit sales, the plaintiffs in error insisting it should all fall on the house in Louisville, and the latter house contending it is only liable for one half.

It appears in proof that the sugar market in Louisville in the spring and summer of that year, was unusually dull and inactive, and sales of sugar were generally on credit. And it is alledged by Hewitt, Allison & Co. in their bill, and not denied by the answer, that it was distinctly understood by the parties when the adventure was agreed upon, that most of the sales would, in all probability, have to be on credit.

A factor or general agent to sell, is not personally liable for losses arising from sale on credit, where he adheres to the custom of the place where the sales

If the firm of Hewitt, Allison & Co. were to be regarded in this transaction, as the mere agents of De Lazardi & Co., and the sugar had been consigned to them as such, to sell in the usual way in Louisville, even then their liability for the losses that have occurred on sales made by them, would be very questionable. A general

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De Lazardi vs Hewitt, Allison & Co.

are made, and the purchasers are good at the date of the sales, and the principal had reasonable e.

agent or factor, selling to a person of good credit at the time, payable at a future day, where the usage is to sell upon credit, is not liable though such vendee may afterwards become insolvent, provided the credit given was reasonable and usual, and his principal was made acquainted with the transaction within a reasonable and usual space of time: (*Smith's Mercantile Law, side page*, 87.)

The proof is abundant that the sales upon which losses have been sustained by the subsequent failure of the vendees, were made to persons who, at the time, were in good standing and credit, and to whom sales on time would then have been made by the most prudent and cautious dealers in Louisville. There is some contrariety in the evidence in regard to the usual credit given at that period upon sales of sugar; some of the witnesses stating that four months was the usual credit, and others that there was no particular usage on the subject, sales being frequently made on a credit of four or six months with a promise of renewal at the expiration of the time; from which the inference is fairly deducible, that the course of trade in this article, had not then a fixed and limited credit, an extension beyond which should be considered as unreasonable. The sales having been made on the most advantageous terms that could be procured, the article of sugar going off very heavily in market that season, there is nothing in the credit given, that can subject the house of Hewitt, Allison & Co., to liability for the whole loss occasioned by the failure of the vendees.

It is not denied that an account of the sales was made and transmitted to De Lazardi & Co. within a reasonable time, but it is contended that the account was unfair and deceptive, and not calculated to apprise the owners of the sugar of the true nature and character of the sales which had been made. The sales on time, where interest was payable from the day of sale, were entered on the account equal to cash, without noting the length of credit given, and the credit given on sales where there was a promise of renewal, was alone mentioned, no allusion being made to the agreement for further extension of time on the expiration of the credit. The evidence is contra-

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dictory in relation to the construction that would be given by merchants to an account made in this way. Some of the witnesses proving, equal to cash, would be understood to mean, the money was secured so as to make it equal to cash, and the consignor as having a right, on such an account having been rendered, to call on the consignee immediately, for the amount of sales, whilst others prove it would be understood by merchants to mean only, that although the sale was on credit, yet the money carried interest and was thereby equivalent to cash. From the evidence, the account may be regarded as ambiguous, and if it stood alone without any explanation, might not be deemed such as the law requires the agent to return to his principal. But the account was taken to New Orleans by the chief clerk of Hewitt, Allison & Co., who had made it out, and was thoroughly acquainted with the whole transaction, and who having a letter of introduction from his employers to De Lazardi & Co., had a personal interview with some of the members of the firm, handed them the account of sales, and according to his recollection, explained it fully. If, however, no explanation was actually made, he was there prepared to explain any part of the account that is at all equivocal; and if it were not understood, or its meaning regarded as doubtful by them, it was their duty to have made such enquiries as was necessary to its full comprehension. It is obvious, however, they sustained no injury by the entries as made. They assert, it is true, they would have obtained a guarantee, had they learned from the account, the sales were on credit. The idea of loss from the want of this information is, however, repelled by the fact that no guarantee was procured by them on the sales expressly entered on the account as made on time.

Partners are each bound to bear their equal part of loss, unless there has been a culpable unfaithfulness in duty to the absent partner.

Should there be however any doubt as to the liability of Hewitt, Allison & Co., regarding them as agents, there is another aspect of the transaction, in which, in our opinion, their liability cannot be extended beyond one half of this loss. The two houses were in reality partners in the speculation. The purchase of the sugar was a joint one, and in the sales there was to be a community of profit and loss. There may be a partnership in one

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De Lizardi vs Hewitt, Allison & Co.

adventure as well as in a continuing business. Such a partnesrship existed on this occasion. The respective rights and liabilities of the parties must therefore be determined, not by the law in relation to principal and agent, but by the terms of the partnership and the law on this subject. The loss incurred has therefore to be divided between them, unless the house in Louisville, by its conduct in some respect, has made itself liable as a partner in this transaction for the whole of it. It results from that broad principle of equity, that from every person standing in an attitude of trust and confidence in respect to another, a conduct marked with the most scrupulous good faith shall be required, that partners should act with the utmost candor and fairness towards each other, and with the most honorable exactness in the management of their joint business. That such has been the conduct of the house in Louisville in this transaction, is perfectly manifest. That they exercised their best judgment and utmost vigilance, may well be presumed, when it is recollected, they were acting for themselves, as well as others, and must have been sensible that one half of any loss incurred would fall upon them. There has been nothing done by them which would make one partner responsible to the other. The sales were according to the usual course of business. They were made to individuals apparently good at the time, and such as discreet and prudent men would have sanctioned. Nothing has transpired since the sales to make them responsible for this loss. They have not been instrumental in misleading, at least not intentionally, the other members of the firm. They have withheld no information that would have been useful to their partners. They have acted throughout in good faith, and there is no part of their conduct of which their partners have any just reason to complain.

Wherefore, there being no error in the decree of the Chancellor, it is affirmed.

Pirtle for appellants; *Guthrie* for appellees.

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INDEX.

ABSENT DEFENDANTS.

1. The statutes of Kentucky authorizing proceedings against absent defendants and non-residents, do not apply to cases of tort, but to cases arising out of contract.
2. —The Chancellor's jurisdiction does not extend to torts—he has no power to liquidate damages.
3. As the laws of Kentucky now stand, there is no power of compelling an appearance by attachment or proclamation, of a non-resident, to answer for a tort committed in this State. *Meres* vs *Chrisman, &c.* 423.

ACTION ON THE CASE.

1. Case is not an appropriate remedy to recover property.
   Debt may be maintained for money or property lost at gaming.
   Detinue may also be maintained for property lost at gaming. *Morgan* vs *Lewis*, 244.
2. Action on the case may be maintained where the proceeding against the plaintiff was malicious and unfounded, though the tribunal before which the proceeding was had, had no jurisdiction of the subject, provided the *malice* and falsehood be put forward as the *gravamen* of the action. *Hays* vs *Younglove*, 545.

See *Gaming*, 3.

ADMINISTRATOR.

1. A citizen of Virginia died on his way removing to Kentucky with his property; his family continued their journey and settled in Kentucky.—Held that the Court of the county where the property was stopped, had jurisdiction to grant administration. *Burnett* vs *Meadows' adm'r.* 277.

See *Sureties*, 1, 2.

ADMINISTRATOR *DE BONIS NON.*

1. The jurisdiction to appoint an administrator *de bonis non*, belongs to the Court of the county granting the administration in the first instance. Though there may be some assets in other counties, it gives no jurisdiction. *Burnett* vs *Meadows' administrator*, 278.

ADVERSE POSSESSION.

1. If a party enter under one title and purchase another and adverse title, his possession does not become adverse to that under which he entered, and does not bar it, and those receiving the possession under the person who first entered, cannot set up the title bought in opposition to the title under which the first entry was made. *Pleak* vs *Chambers*, 567.
2. The possession of a purchaser from a joint tenant or parcener, though held by deed is not adverse to the other joint owners, until it is distinctly claimed as a

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ADVERSE POSSESSION—*Continued.*

possession for the whole, and adversely to the other part owners, and notice to them of such adverse holding, when after a lapse of twenty years the right of entry will be bared. (4 *B. Monroe*, 605 *cited.*) *Riggs* vs *Dooly*, &c. 239.

See *Possession*, 1.

ALIMONY.

1. The wife of a convicted felon does not, upon his conviction, become entitled to dower, but alimony only, by the act of 1802, (*Stat. Law*, 1309.) *Wooldridge* vs *Lucas*, 60.
2. In deciding upon claims for alimony, ideal perfection or occasional excellence in the human character, is not the rule of decision, but that standard of excellence which is attainable by the various classes to which it may be applied, and which is sufficiently high to ensure the preservation of morals and good order in society. *Mayhugh* vs *Mayhugh*, 428.
3. In arriving at a conclusion as to the degree of fault in contests between husband and wife, in order to determine the right of the wife to separate from the husband and claim alimony, the Court must look as well to the provocation on the one hand as the reciprocal duties of husband and wife on the other. *Ibid*, 428.
4. When the husband's conduct to the wife is such an habitual course of persecution as to render the bonds of matrimony a place of wretchedness and degradation, she may abandon him and have alimony. *Ibid*, 430.
5. The Court should, upon decreeing alimony, retain power over the case to enlarge or diminish the amount of the decree as the circumstances of the husband may indicate to be proper. *Ibid*, 432.

AMENDMENT.

1. A declaration in case for failing to deliver property agreeably to contract, may be amended, even upon the trial, in stating the day on which the property was to have been delivered. *Bannister* vs *Weatherford*, 272.

ASSAULT AND BATTERY.

1. If the wife commit an assault and battery in presence of the husband, the jury may infer his assent, and find against both. *Phillips* vs *Phillips*, &c. 268.

ASSIGNMENTS.

1. Writings are assignable under our statute of assignments, only where the entire interest of the assignor can pass to the assignee—bonds, bills and promissory notes for the payment of money or property. (*Foree* vs *Tomason*, 2 *Littell*, 167; *Boyd* vs *Rumsey*, 5 *J. J. Marsaall*, 42.) *White* vs *Buck*, 547.
2. An obligation for the performance of personal service, is not assignable. *Ibid*, 548.

ASSIGNMENT OF DEEDS.

1. The grantee in a deed of conveyance, assigned *for value received*, all his right and title to the land described in the deed—Held not to be within the statute against frauds, and that the Chancellor should decree a conveyance. (3 *Litt.* 262.) *Jarboe* vs *McAtee's heirs*, &c. 281.

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ASSIGNOR AND ASSIGNEE.

1. To authorize a recovery by assignee against his assignor of a note, suit must be brought to the first term after the note falls due. A voluntary consent to a continuance of the suit by the assignee, will forfeit his right to recourse against the assignor. A failure to sue out execution upon a judgment by assignee, upon an assigned note for seven days after it might have been done, without excuse is a forfeiture of recourse against assignor *Marr* vs *Smith*, 192.
2. The assignor is not liable to the assignee upon his assignment, though there be a due prosecution of the suit, and a return of *nulla bona* when property has been levied on and the property taken from the officer by a writ of replevin, unless the property be recovered from the assignee in the replevin suit, diligently prosecuted by the assignee, or he is able to show that the property was not subject to the execution. *Levi* vs *Evans*, 115.
3. The assignee is bound to pursue with due diligence every reasonable means which the law affords, and which the assignor, had he the control of the demand, would in all reasonable probability have used to make the debt out of the obligor, before he can resort to the assignor. *Ibid.*
4. If the debtor's property be mortgaged, the assignee should sell the equity of redemption, or compel a foreclosure, if the mortgaged debts are less than the value of the property, and have the surplus appropriated to the payment of his debt, before resorting to the assignor. *Ibid*, 116.

ATTACHMENTS IN CHANCERY.

1. Property upon which attachments are levied is in the custody of the law, and under the entire control of the Chancellor, and not liable to levy and sale under execution. (*Hackley's ex'r.* vs *Swigert*, 5 *B. Monroe.*) *Kane et al.* vs *Pilcher, &c.* 652.
2. The execution of a bond for the delivery of property attached by order of the Chancellor, does not release the property so as to make it subject to sale by execution, at the instance of another creditor. (*Bell* vs *Pierce*, 1 *B. Monroe*, 73.) *Ibid*, 652.
3. Proof that a debtor actually contemplated a sale of his property to his son upon long credits, and transferring to his creditors his son's notes, who was without means.—Held to be sufficient evidence of a design to postpone creditors, to authorize an attachment under the statute. *Clark* vs *Smith, &c.* 275.
4. A guarnishee in whose hands a debt is attached, but who makes no resistance, is not liable for costs to the attaching creditor. *Graham, &c.* vs *Moore, &c.* 54.
5. An attaching creditor of a debt in the hands of a third person, is not entitled to any decree for costs against the third person who has not answered. *Ibid*, 55.
6. To sieze and apply a fund in the hands of a resident, to the payment of the debt of an absent debtor, process must be sued out in the county where the person resides who holds the funds, or be served in the county where the suit is instituted. *Roberts* vs *Walker and Embree*, 75.
7. The statute of 1838, (3 *Stat. Law*, 116,) does not authorize the Chancellor to take property which may have been purchased with the fraudulent intent not to pay for it, after it has passed into the hands of an innocent *bona fide* purchaser for valuable consideration, and restore it to the first vendor. *Gibson* vs *Moore, &c.* 84.
8. The debtor of a debtor against whom a bill is filed by a creditor to have the benefit of a demand or chose in action decreed to him, cannot be required to withhold payment and violate his contract with his creditor; and if property is

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ATTACHMENTS IN CHANCERY—*Continued.*

to be delivered, unless a receiver be appointed by the Chancellor, the debtor may still go on to comply with his contract by paying the property, where the consequence of his failure to pay property, or otherwise fail to comply would subject him to the payment of money. If at the filing of the bill the contract *has been forfeited*, and the *debtor* of the debtor has subjected himself to the payment of damages, the benefit thereof may be decreed to the attaching creditor. *Blackburn* vs *Davidson*, 102.

9. To sustain an attachment in chancery on the ground of a fraudulent intent to defraud the complainant, it is necessary to show the existence of such intent before the attachment—to prove that it originated afterwards will not do. *Warner* vs *Everett*, *&c.* 265.

10. A bill of a creditor for the discovery of assets, and their subjection to his debt, will not operate as a lien upon any interest or right, which might have been known by consulting the public records, and not specified in the bill. *McCauley*, *&c.* vs *Rodes and Macklin*, 468.

ATTACHMENT LIEN.

1. Where several attaching creditors, by proceedings in chancery, seeking to subject the same property to their respective liens, place their process in the hands of the same officer or his deputies, it is the duty of the officer to serve the process in the order in which it is placed in his hands, or the hands of his deputies; and if the officer should fail to serve the process in that order, the Chancellor having possession of the fund will distribute it according to the rule which should have governed the officer in serving the process. (*Kennon* vs *Ficklin*, *&c.*, 6 *B. Monroe*, 414, *overruling Nutter* vs *Connett*, 3 *B. Monroe*, 203.) *Clay* vs *Scott*, *&c.* 554.

ATTORNIES AT LAW.

1. Attornies at law have no authority as such, to release the judgments at law for lands, which they may recover for their clients, without a new authority to do so; though they have power to enforce such judgments for the benefit of their clients, they may not release them. Such a release derives no additional force from the fact that satisfaction was entered of record by the direction of the attorney. *Harrow et al.* vs *Farrow's heirs*, 127.

ATTORNEY AND CLIENT.

1. An attorney who in violation of that confidential relation which should exist between himself and client, imposes upon him, or permits others to do so, when he might prevent it, will not be permitted to avail himself of any advantage obtained in a contract by such conduct. *Smith* vs *Thompson's heirs*, 308.

2. An attorney who conducts a suit by which property is subjected to sale, and who to some extent, has power over the sale, will not be protected in his purchase of the property at a sacrifice. (3 *Dana*, 614; *Ibid*, 388; 2 *B. Monroe*, 497.) *Ibid*, 309.

3. A contract between attorney and client, after a lapse of near twenty years, by which the attorney was to have an interest in the subject matter in litigation, having been acted upon by the parties, though it might appear unreasonable now, owing to the enhanced value of the property in litigation, permitted to stand, when assailed by the client. *Ibid*, 310.

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ATTORNIES FOR THE COMMONWEALTH.

1. Attornies for the Commonwealth are not entitled, under the statutes of Kentucky, to any part of the fine imposed for keeping gaming tables, &c., unless they prosecute to conviction. *Ashlock* vs *Commonwealth*, 46.
2. The portion of the fine to be assessed against keepers of tipling houses, to which the attorney for the Commonwealth is entitled, cannot be regarded as costs incident to the judgment, but a penalty. If the Governor has power to remit the penalty after judgment, and does so, the attorney cannot have his half of the penalty allowed and collected as costs. *Dewey* vs *Commonwealth*, 78.

AVERMENTS.

See *Surviving partners*, 1.

BAILMENT.

1. The bailee of a slave for hire, is bound to ordinary diligence in regard to the health, safety, &c. of the slave, and responsible for ordinary negligence as in all cases of bailment for hire. *Swigert, &c.* vs *Graham*, 662.
2. —But what is ordinary care in regard to one species of property, may not be so in regard to other property, it may vary on account of the subject itself, or the circumstances in which it is placed. *Ibid*, 663.
3. Ordinary diligence or care means that degree of care, attention or exertion which, under the circumstances, a man of ordinary prudence and discretion would exercise in reference to the particular thing were it his own property. *Ibid*, 663.
4. So there is a corresponding obligation on the part of the bailor who knows the purpose for which the thing is bailed, that it is capable of the use for which it is hired, and implies a right to use it in that service, in the ordinary way, unless there should be some special reason, at some particular time, known to the bailee, why it should not be so used. *Ibid*, 663.
5. A slave being capable of voluntary motion, of observation, experience, knowledge and skill, is presumed, in ordinary cases, to be capable of taking care of himself, if disposed to do so, without constant supervision or physical control. The hirer of a slave should not expose him to extraordinary hazard without necessity, and when necessary, such caution should be used as a man of prudence would use in regard to his own slave, regulated by the intelligence of the slave. *Ibid*, 664.

BANKRUPT LAW.

1. Under the bankrupt law of the United States, the assignee had the right to prosecute all suits depending in the name of the bankrupt at the time of the decree in bankruptcy, and defend all suits to which he was a party; to claim all his rights under his appointment as assignee, and the right to be made a party to any controversy in which as assignee, he might have an interest. *Kane et al.* vs *Pilcher, &c.* 654.

BAR BY FORMER ADJUDICATION.

1. That a party failed to obtain relief before the Chancellor, who had no jurisdiction of the subject, presents no bar to relief on a writ of error *coram vobis*, before a Court of law, that being the appropriate tribunal and remedy. *Breckinridge* vs *Coleman*, 331.

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BILLS OF DISCOVERY.

1. A party cannot excuse himself from answering a bill in chancery seeking relief and a discovery, by suggesting that he must subject himself to the consequences of a supposed crime or misdemeanor, though the Court will not subject him, by his own oath, to punishment, (*Mitford's Pleadings*, 256.) If the bill is filed merely for a discovery a demurrer will lie, but if filed for relief, though defendant may decline to answer, or demurr to that part requiring a discovery; yet a general demurrer which precludes relief as well as a discovery, should not be sustained. *Meres* vs *Chrisman*, 422–3.

BILLS OF EXCHANGE.

1. Notice of the dishonor of a bill of exchange is reasonable, if forwarded one day after the dishonor; each endorser has one day after notice to forward notice to his immediate endorser. *Smith* vs *Roach's ex'r*. 17.
2. It is not indispensible that a bill of exchange drawn any number of days *after date*, should be presented for acceptance, but if presented and not accepted, notice thereof should be given in reasonable time, to the drawer. And if such bill be presented and dishonored, though no protest be made or notice given, the holder may, in a suit against the drawer or endorser, show by any competent evidence, the fact of refusal to accept. (1 *Peters*, 25; 2 *Ibid*, 170.) *Ibid*, 19.
3. The short note of the Notary, usually made upon a bill of exchange when presented for acceptance, which is drawn payable after date, when acceptance has been refused, is competent evidence for a defendant to prove that the bill had been presented and dishonored, in order to avoid responsibility for want of notice in due time of such dishonor. *Ibid*, 20.
4. The holder of a bill of exchange which has been dishonored, is entitled to demand the amount of the bill and interest, and in some cases the expenses incident to the dishonor: (*Smith's Mercantile Law*, 215; *Chitty on Bills*, 489,) which according to the mercantile law of Europe, includes interest, costs of protest, premium and re-exchange paid. (3 *Kent's Com.* 316.) *Pilcher, assignee* vs *The Banks*, 550
5. As between endorser and endorsee, the real consideration of a bill may be enquired into, and that be the measure of responsibility between them in case of dishonor of the bill; but other parties to the bill are liable for the full amount. Banks, as holders, have the same rights as individuals. *Ibid*, 551.
6. Though a bill be in fact drawn in Kentucky, or a note given in Kentucky, yet dated as at St. Louis, and payable in St. Louis, the law of Missouri determines its legal character and effect. *Goddin* vs *Shipley*, 578.
7. When the local law of a State does not fix the days of grace which shall be allowed upon negotiable notes, the law merchant fixes it, which is by custom, variant in different places, and the custom should be proved. *Ibid*, 597.

BILLS OF REVIEW.

1. That which is put in issue by an original bill, cannot be made the subject matter of a bill of review. Parties to suits in which decrees are rendered are bound by them until reversed; but they may impeach them by direct proceeding on the ground of error of law or of fact, or for fraud in their obtention, by petition for a re-hearing, writ of error, appeal or bill of review. *Thorp, &c.* vs *Cotton's ex'r*. 640.
2. A want of proper parties is a good ground for filing a bill of review, (*Mitford's Pleadings*, 92.) *Alexander, &c.* vs *Slavens*, 355.

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BONDS FOR COSTS.

1. A non-resident upon making a motion in the County Court, where costs may be adjudged against such non-resident, should be required to give bond and security for costs. *Murphey's heirs and devisees* vs *Murphey*, 232.
2. A surety for costs of a non-resident plaintiff, moved the Court and had rule upon the plaintiff to give other security at the next term on the calling of the cause, at which time the plaintiff alledged that the surety had been indemnified and had agreed to stand surety, and had promised to be in Court and consent, but from some cause unknown to plaintiff, was absent, and asked leave till next morning to have him present, the Court refused—Held that the Court abused its discretion. *Crawford's heirs* vs *Kenley*, 264.

BONDS, FORTHCOMING.

1. An officer has no right to take a forthcoming bond upon the levy of an execution which is endorsed "no security of any kind to be taken." Such bond may be good as a security to the officer, but is not valid as a statutory forthcoming bond. *Poston, &c.* vs *Southern*, 289.

CASE.

1. Case lies for negligently navigating a boat, whereby collision and injury occurs to another craft. *Inman, Galt, &c.* vs *Funk*, 538.

CESTUI QUE TRUSTS.

1. The right and interest of a *cestui que trust* in land, is subject to sale under execution, since the statute of 1796, and the legal title passes by the sale to the purchaser. The land is subject to sale, and passes by it, not a mere equity only. *Blanchard, &c.* vs *Taylor's heirs*, 648.

CHAMPERTY.

1. No purchases of land made at Sheriff's sales under execution are violations of the laws of Kentucky against Champerty. *Snowden* vs *McKinney*, 259.

CHANCERY PRACTICE.

1. When one creditor files a bill against the heir of a debtor, to subject assets to the payment of his debt, another creditor of the decedent showing a debt due to him also, should, on his petition for that purpose, be admitted a party, and participate in the distribution of the funds. The administrator in such cases, has a right to be a party to such bill against the heir for the discovery of assets, &c. *Cosby's heirs* vs *Wickliffe*, 120.
2. To authorise the proof of exhibits which are filed in a chancery cause by oral testimony, notice of the time when the proof will be offered, should be given to the adverse party. Such exhibits may be proved at or before the hearing of the cause. *Ibid*, 121.
3. Exhibits proved orally before the hearing, cannot be read against those who were not parties when the proof was made. *Ibid.* 121
4. An auditor should be appointed in all cases of complicated accounts, whose report is subject to the revision of the Chancellor. *Roberts' ex'r.* vs *Dale, &c.* 200.
5. Might this Court not reverse a cause for the omission alone of the Circuit Court to appoint an auditor in cases involving a long settlement of complicated accounts? "We should feel it our duty to do so." *Ibid*, 201.

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CHANCERY PRACTICE—*Continued.*

6. The Chancellor has power, even after a chancery suit is out of Court, to make all such orders and rules upon the parties as may be necessary to place them in possession of the rights of which they may have been deprived by his precedent action in the case. *Kane, et al.* vs *Pilcher, &c.* 653.

CHARITIES.

1. The grantor in a deed is not the donor of a charity, when he receives a monied consideration, and therefore the property granted cannot revert. The use of the property, if the grant be to a Church, vests in the society, unless forfeited by some condition in the deed. *Gibson et al.* vs *Armstrong, &c.* 490.
2. If the trustees appointed by the will fail to execute a charity trust, the Chancellor, at the instance of the Attorney General, has jurisdiction to appoint a trustee, and carry the devise into effect; it is according to the English practice. *Attorney General* vs *Wallace's devisees*, 618.
3. When real estate is devised to charitable uses, the trustees whose duty it is to carry out the devise, have the power to sell, which also includes the power to compromise disputes concerning the title to the property, which threaten to be protracted and expensive, with the sanction of the Chancellor. *Attorney General* vs *Wallace's devisees*, 622.

See *Devisees*, 1.

CHOSES IN ACTION.

1. The debtor of a debtor against whom a bill is filed by a creditor to have the benefit of a chose in action, or demand against such debtor, cannot be required to violate his contract with *his creditor*; and if property is to be delivered, unless a receiver be appointed by the Chancellor, he may still go on to comply with his contract, by payment to his creditor, if the consequence of his failing to pay might subject him to pay money instead of property. If *he has failed* to pay property and subjected himself to pay money, that may be decreed to the attaching creditor. *Blackburn* vs *Davideon*, 102.

CHURCH PROPERTY.

1. The General Conference of the Methodist E. Church having the right to change its organization and divide the Church, had also the right to concede to the local Churches the right to decide by majorities, to which division the local societies should be attached. The Church at Maysville having by majority determined to adhere to the Methodist Episcopal Church South, is bound to adhere to that division, and the minority of that local society having put the question upon that test, are now estopped to controvert the authority of the majority to decide the question, and to claim the use of the Maysville Church in opposition to the rights of the majority, for any portion of the time. *Gibson et al.* vs *Armstrong, &c.* 521 *to* 527.
2. A fund was raised by subscription and vested in trustees to build a Church, for the use of the Methodist Episcopal Church in Harrodsburg two sabbaths in the month, and for the use of other denominations for the remaining part of each month. The same trustees were authorized to sell the house to another denomination, and with the proceeds to buy another for the exclusive use of the Methodist Episcopal Church, which they did—Held that the trust was well performed, and a specific execution thereof decreed. *Alexander, &c.* vs *Slavens, &c.* 354.

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CHURCH PROPERTY—*Continued.*

3. The proviso in the statute of 1814, (3 *Stat. Law*, 1347,) was not intended to affect the operation of deeds, nor permanently to affect the rights of the beneficiaries in the deed for Church property, nor to restrict the powers of Courts of equity in ascertaining and enforcing the rights according to the true intent of the deeds conferring the rights. *Gibson et al.* vs *Armstrong*, *&c.* 484.
4. The proviso was intended to prevent the trustees in cases of schism, from excluding either party from the Church, or perhaps from expelling them even by suit at law; but does not prohibit the application of either party, being beneficiaries, to the Chancellor for the establishment of their rights against other claimants under the deed, which the Court must do. (*Shannon* vs *Frost*, 3 *B. Monroe*, 253.) *Ibid*, 485.
5. In case of division of a local Methodist Episcopal Church society, where each party claims the use, their rights must be decided by the rules of the Church, in which no right is perceived in a separating minority against the majority maintaining the original organization. *Ibid*, 491.
6. Under the deed in this case, is secured the use of the Church to such ministers belonging to the Methodist Episcopal Church as shall be designated by the General Conference or the Annual Conferences under the authority of the General Conference. In case of division of the local society, that branch receiving its minister from the proper authority, is to be recognized as the party entitled to the use of the pulpit, under the deed. *Ibid*, 494.

CHURCH ORGANIZATION.

1. Where the highest judicial authority of a Church has acted, the judiciary of the State should not interfere, though the authority of the Church might be doubtful, if the consequence would be discord and confusion instead of peace. *Gibson et al.* vs *Armstrong*, *&c.* 516.
2. The Methodist Episcopal Church in the United States has the same right and power to change its name, form and organization, as it had to organize originally. It is an inherent right. *Ibid*, 500.
3. The deeds made to the local societies of the Methodist Episcopal Church in the United States, are presumed to have been made upon the understanding of the right of the Church to change the form of its organization without incuring any forfeiture of the rights under the deeds. The immutablity of the Church is not made a condition of the enjoyment of the property granted. *Ibid*, 500.
4. The deeds have for their great object the securing the local use to the local societies; the local societies to be in subordination to the higher authorities of the Church. Though the higher authorities of the Church do not now exist in the then *form*, yet the local society exists, the beneficiaries exist, and the Methodist Episcopal Church exists, and the uses do not fail. *Ibid*, 500.
5. The Methodist Episcopal Church in the United States being a self organized body, had the inherent right to change the form of its organization, and to fix the territorial lines in case of division, without changing the rights of the local societies in the different divisions under the deeds made for Church property, or in any way impairing or destroying the rights of the beneficiaries under those deeds. *Ibid*, 506-7-8-9.
6. The General Conference of the Methodist Episcopal Church had the right to judge of the expediency of a separation and decide thereon, and to grant the power to the Southern Churches to form a separate organization. *Ibid*, 513-14.

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COMITY.

1. The laws of sister States cannot be brought to Kentucky to create a right, nor to regulate the mode of its exercise or assertion, nor to establish a right in contravention of our laws or policy, and to the injury of our citizens; but they may be brought here to prove a right which existed in another State while the parties and subject was wholly within the jurisdiction of that State. *Beard's ex'r.* vs *Bayse*, 144.
2. The separation of the legal title of slaves from the beneficial use in favor of the wife, which exists in respect of property owned by the wife at the marriage, is not so far repugnant to the policy of Kentucky that the right of the wife cannot be protected here. *Ibid*, 144-5.

COMMISSIONERS' BOOKS.

1. Commissioners' books are competent evidence against the person whose duty it is to give in the list of taxable property, without proof that the same was given in upon oath, upon proof that the commissioner who took in the list was absent from the State, and that the books were in his hand writing. *Sutton* vs *Floyd*, 4.

CONDITIONS, PRECEDENT.

See *Contracts dependent, &c.* 1, 2.

CONSIDERATION.

1. Where a note is absolute upon its face, for the payment of money, in aid of an institution of learning, can parol proof be admitted to prove that it was intended to be applied to one branch of learning to be taught in the institution—Qu? *Craig* vs *Baptist Education Society*, 74.
2. Parol proof dehors the writing, cannot be admitted in such case, to show the moving consideration for the execution of the note, where the objects and considerations are various and none are specified in the writing. *Ibid*, 74.
3. A receipt against a bond or note given in consideration that the party to whom it was given would forbear further to prosecute the party by whom it was given, held to be invalid as a defence to a suit on the note. *Best* vs *Higginbotham*, 124.
4. An agreement between several children of a testator, to contribute to raise a fund to make one equal with the others in sharing the property of the testator, and the payment of the sum to be contributed or the execution of notes therefor, is a good consideration to sustain a note given by another for his part of the sum agreed to be paid. *Graves* vs *Graves*, 214.
5. The relation of father and son is a good consideration to uphold a written promise by the father to convey land to the son and authorizes the Chancellor to decree a specific execution. *Mahan, &c.* vs *Mahan*, 582.

CONSOLIDATED SUITS IN CHANCERY.

1. Where suits in chancery are consolidated and heard together, the object of all which is satisfaction out of a common fund, and to settle the demands of the respective claimants between each other and against the common debtor to have satisfaction out of the common fund, the decree is binding upon all the parties. *Tharp, &c.* vs *Cotton's ex'r*, 641.

CONSTABLES.

1. In a suit against a Constable and his sureties on his bond, a mere averment that

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CONSTABLES—*Continued*..

the Constable, by color of his office, collected money from the relator is insufficient to authorize a recovery. And an averment that the Constable collected money under executions and failed to return them satisfied without averring that he had executions in force at the time of the receipt of the money, is not a sufficient averment to charge the sureties. To charge the sureties it must clearly appear that the act done was one which he might rightfully do as Constable, and done under claim of right so to act by virtue of his office. *Commonwealth, for Richardson* vs *Cole, &c.* 250.

2. A declaration against a Constable and sureties, should show a breach of official duty—some exaction in his official character or by color of his office of Constable, &c. *Ibid*, 253.

CONSTITUTIONAL LAW.

See *Obligation of contracts*, 1.

CONTINGENT ESTATES.

See *Devises*, 1, 5.

CONTRACTS.

1. That part of the Constitution prohibiting the passage of laws impairing the obligation of contracts, applies as well to executed as to executory contracts. *Pearce's heirs* vs *Patton*, 168.
2. The 11th section of the statute of 1831, (1 *Stat. Law*, 453,) so far as it authorizes a Court of chancery to confirm title in the vendee of a *feme covert* who has conveyed by a deed which was ineffectual to pass title when made, is in violation of the Constitution. *Ibid*, 168.
3. The fact that one who had contracted to deliver cumbrous property on a particular day to one, afterwards contracted to deliver the same property to another, did not authorize the first purchaser to sue for a breach of the contract with him or dispense wrth the performance of every act precedent or concurrent, which it was his duty to perform to entitle him to his action. *Bannister* vs *Weatherford*, 272.
4. A contract referring by its terms, to a particular place of performance, is to be construed and its legal character determined by the law of the place of performance. *Goddin* vs *Shipley*, 577.

See *Obligation of contracts*, 1.

CONTRACTS, DEPENDENT AND INDEPENDENT.

1. It has been held that in a contract to do work, where any money is to be paid before the work is done, that the contracts are independent, (2 *Bibb*, 15; 4 *Litt.* 253;) but the whole contract should be considered, to ascertain the intention of the parties: (9 *Dana*, 64,) and if one party rely upon the covenant of the other party for indemnity, he will be left to the remedy thereon, but if upon performance, then performance is a precedent condition. *Allen* vs *Sanders*, 594.
2. A. stipulated to build a house for S. by a specified time. S. to pay $50 in hand, balance when the work was done, &c.—Held that the payment of the $50 was an independent undertaking which might be sued for without averring performance of the work, but as to the part which was to be paid when the house was done, no suit could be maintained without averring performance. *Ibid*, 594.

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CONTRIBUTION.

1. A deed of gift giving specific sums of money to the donor's children, "to be raised at his death by the sale of property not deeded away, if sufficient, if not sufficient, then to be raised by the sale of land and slaves"—Held that though the other property proved insufficient, the specific gift was not liable to contribution. *Petty's heirs* vs *Montague*, 56.
2. A deed of gift gave specific sums to donor's children, to be raised at his death by the sale of property not deeded away, if sufficient, if not sufficient, then to be raised by the sale of land and slaves, it proved to be insufficient.—Held that the land and the slaves were subject to the payment of the sums, and that they constituted a charge upon the gift of them, after paying debts. *Ibid*, 56.

See *Devises*, 4.

CONVEYANCES.

1. The statute of 1831, (1 *Stat. Law*, 450,) concerning suits to perfect titles upon defective conveyances, decided to apply alone to cases where deeds had been made before the passage of the act, by *femes covert*, without a *dedimus potestatem*, and the wife's right of entry or that of the heir had accrued before that time, not to cases where there was not a right of entry in the *feme* or her heirs. *Pearce's heirs* vs *Patton et al.* 163-7.
2. Two Justices of the Peace of the county where land lies which is intended to be conveyed, and the grantors reside, have authority to take the acknowledgment and privy examination of *femes covert*, but their certificates must be under their *hands and seals*, otherwise the conveyance will be insufficient. *Kemper* vs *Hughes*, 256.

CORPORATIONS.

1. Might not the creditors of an incorporated company maintain a suit at law against the trustees of a company, for mismanagement of the funds of the corporation, in improperly declaring dividends and paying out the funds to the stockholders when there was no profits to divide?—QUERE. *Railroad Company* vs *Bridges*, 559.

See *Lexington and Ohio Railroad Company*.

CORPORATION PROPERTY.

See *Taxation*, 1, 2, 3.

COSTS.

1. A garnishee in whose hands a debt is attached, and who makes no resistance, is not liable for costs to the attaching creditor. *Graham, &c.* vs *Moore, &c.* 54.
2. A vendee who files his bill for title which is then not perfect, but is perfected after the filing of the bill, is entitled to costs on obtaining a decree for title. *Jarboe* vs *McAtee's heirs, &c.* 283.

See *Attachment in Chancery*, 4, 5.

COUNTY COURTS.

1. County Courts have no jurisdiction to assign dower, except in cases where the husband died seized, and the right to dower is admitted and uncontroverted. (4 *Bibb*, 462, *cited.*) *Murphey's heirs and devisees* vs *Murphey*, 233. *Garris' heirs* vs *Garris*, 461.

See *Dower*, 1, 2.

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COUNTY LEVIES.

1. The bonds of collectors of County levies, though taken payable to the Commonwealth, are valid, since the statute of 1810. (5 *B. Monroe*, 196.) *McGuire, &c.* vs *Justices of Owsley County*, 340.
2. Motions against collectors of County levies may properly be made in the County Court, and in the name of the County Court, (1 *Stat. Law*, 503; 2 *Ibid*, 1115;) and the statute of 1810, authorizing a suit on the bond, does not take away the remedy by motion. *Ibid*, 341.
3. Nothing appearing to the contrary, this Court will presume that a competent number of Justices were present when a County levy was laid. *Ibid*, 341.
4. The County Court may levy a sum upon the citizens sufficient to cover claims against the county—such as may accrue on account of the public buildings, &c., and to cover deficiencies arising in levies of preceding years. *Ibid*, 342.

COURTESY.

1. Actual possession by the husband, of the lands of the wife, at the time of, or during the coverture, is in general necessary to constitute the husband a tenant by the courtesy after the death of the wife. *Vanaredall* vs *Fauntleroy's heirs*, 402.
2. If an entry is made upon the lands of the wife by the husband, or by another by his authority—a vendee immediate or remote, the husband's right as tenant by the courtesy is thereby consummated. *Ibid*, 402.
3. The possession of the vendee of tenant by the courtesy, immediate or remote, is not adverse, but consistent with the title of the wife or her heirs. *Ibid*, 402.

COVENANTOR.

1. A covenantee is sued, of which the covenantor has notice, the covenantor is bound by the decision against the covenantee. *Beard's ex'r.* vs *Bayse*, 150.

DAYS OF GRACE.

1. When the local laws of a State do not fix the days of grace which shall be allowed upon negotiable notes, the law merchant fixes it, by custom, which custom varies in different places, and the custom at the place of payment should be proved. *Goddin* vs *Shipley*, 579.

DEBT.

1. Debt on a writing and debt upon simple contract, may be joined in the same declaration. (1 *Chitty's Pleadings*, 229.) *Patterson. &c.* vs *Chalmers*, 596.
See *Gaming*, 3.

DECREES.

1. Decrees are binding upon none except such as are parties or privies. *Alexander, &c.* vs *Slavens, &c.* 356.

DECREES, *IN PERSONAM.*

1. It is error to decree *in personam*, against a non-resident upon whom there has not been service of process and who had no estate in Kentucky. (*Menifee's heirs* vs *Hynman*, 3 *B. Monroe*, 406.) *Mattingly's heirs* vs *Corbit*, 378.

DEEDS.

1. A deed on which was this endorsement, "Caroline, June Court, 1793. This deed was acknowledged and ordered to be recorded—Test, J. N. Truly recorded—Test, J. P., D. C."—Held not to be a sufficient acknowledgment of the deed before a Court of law of the county in which the grantor resided, nor is

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DEEDS—*Continued.*

there any thing in the authentication to show that such is the usual manner of authenticating such acts, and there is no seal. *Blanchard, &c.* vs *Taylor's heirs*, 648.

DEEDS OF GIFT.

See *Contribution*, 1, 2.

DEPOSITIONS.

1. Notice given at Lexington, Kentucky, in reasonable time, to take a deposition at Natchez, Mississippi, on the 15th, 16th, 17th or 18th, and taken on the last named day, held to be well taken. (2 *J. J. Marshall*, 55 *cited.*) *Thomas* vs *Davis*, 228.
2. It is not indispensably necessary to file an affidavit on an application in Court for leave to take depositions. Affidavit should be filed with the Clerk where a commission issues in vacation. (*Cites* 7 *Monroe*, 576.) *Ibid.* 228.
3. Depositions taken before all the necessary parties were before the Court, were re-taken after the parties were all made, in the last depositions the witnesses re-affirm the statements made in their former depositions—Held that the first depositions were then properly permitted by the Court to be read. *Strader, &c.* vs *Graham*, 633.
4. The deposition of one of the obligors in a bond given for the performance of a decree that might be rendered upon an attachment levied on a steam boat, or the deposition of a part owner of such boat, is incompetent evidence for the defendants. *Ibid*, 634.

DETINUE.

1. The default of a defendant in an action of detinue, admits the plaintiff's right in the property but not the value alledged in the declaration; a jury is necessary to ascertain the value of the property and the damages for detention before judgment. *Thompson* vs *Thompson's ex'r.* 421.
2. Detinue may be maintained for property lost at gaming. *Morgan* vs *Lewis*, 244.

DEVASTAVIT.

1. No suit at law can be maintained for a devastavit without a judgment at law. *Mattingly's heirs* vs *Corbit*, 376.

DEVISES.

1. The testator devised to his wife the farm on which he lived, &c., household and kitchen furniture, &c., for her support during life, his daughter R. to be entitled to a room in the house, &c., so long as she remained single; on the decease of the wife the farm, &c. to become the property of his son Cyrus, when arrived at the age of 26 years: but after providing for the support of his mother, Cyrus is entitled to all the profits of the farm except the right reserved to R.—Held that Cyrus had a vested right at the death of his father, in the profits of, as well as the land, which he might sell after he arrived to the age of twenty one years, and not a contingent estate depending upon his arriving to the age of 26 years. *Danforth* vs *Talbot's adm'r.* 629.
2. Slaves devised pass at once to the devisee, and the executor has no right to ask a refunding bond; before distributing slaves descended he may ask such bond. *Floyd* vs *Floyd, &c.* 291.

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DEVISES—*Continued.*

3. Slaves devised and slaves descended, should not be placed in one class, but kept distinct and so divided. *Ibid*, 291.
4. When the object of a testator, as expressed, was to distribute his estate equally amongst his children, including advances theretofore made as he fixes the price of the property and amount of money advanced, the Chancellor has no power or right to alter the amounts so fixed and stated by the testator as the basis of equalization, by placing a different value upon the property advanced by the testator, unless there has been fraud. *Nelson's ex'r.* vs *Nelson*, 676.
5. A devise in trust for the benefit of one and his family, if he should have one, is valid in both its branches, though it be contingent as to the *family*, as to whom it is an executory devise, depending upon a contingency which must happen within the life of a person in being. It is a springing or shifting use, each member of the family being entitled as they come into being. *Flournoy* vs *Johnson and Tingley*, 694.
6. Where there is a devise in charity and the mode of its application is left in the discretion of trustees appointed by the will, the Chancellor will not interfere merely to control the discretion of the trustees, and to administer the charity through a scheme of his own devising, unless there be some failure, abuse or want of capacity in the trustees to carry out the trust; when the Chancellor will assume the execution of the trust in the place of the trustees. But where trustees unreasonably delay to commence the duty of carrying out a charitable trust, and a bill be filed, though the trustees may profess in their answer, a willingness to carry out the trust, it is proper for the Chancellor to retain the control of the case and require the trustees to report a scheme of carrying out the devise, that the devise may be speedily carried out with the intention of the testator. *Attorney General* vs *Wallace's devisees*, 621.

See *Wills*, 3, 9, 14.

DISTRESS WARRANTS.

1. A distress warrant cannot issue or be levied until the day after the rent falls due. (*Hardin*, 297; *Thomas' Coke*, 254, *note C.*) But it may be levied after the rent falls due, according to the statutes now in force both in England and Kentucky; or before the rent falls due under particular circumstances, pointed out by the statutes, (2 *Stat. Law*, 1352,) not however found to exist in this case. *Fry* vs *Breckinridge*, 34.
2. Distress cannot be made in the night time, (3 *Thomas' Coke*, 254 *and* 142, *a.*) but in the day time, which is between sun rise and sun set, (*Ibid*, *note C. p.* 142,) that the tenant may have an opportunity to tender the rent. *Ibid*, 35.
3. The mere fact that a distress for rent was illegal, within the 3d sec. of the statute of 1748, does not authorize a judgment for double the value of the distress made; there must be also a sale of the property thus taken, to authorize a judgment for the double damages. *Ibid*, 37.

DISTRIBUTION.

1. A widow renouncing the provisions of her husband's will, is entitled, under the 24th sec. of the statute of 1797, to one third *only* of the slaves during life, when they pass as directed by the will. *Tibbs* vs *Tibbs' ex'r.* 112.
2. —But where the husband dies intestate as to his goods and chattels, or any part thereof, without child or children, his widow, by the 28th sec. of the same statute, is entitled to half the slaves for her life, and half the personal estate after payment of the debts of the intestate. *Ibid*, 113.

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DISTRIBUTION—*Continued.*

3. A distributee may enjoin in his own hands a debt due to the executor or administrator, unless there be debts against the estate, as to which the Chancellor should cause the enquiry to be made by commissioners. *James et al.* vs *Langdon*, 198.

4. Before distributing estates, the Chancellor should require refunding bonds to be given by the distributees, where the lapse of time is not such as to raise the presumption that the debts have been all paid. A decree for distribution should ascertain the amount to be paid to each distributee, and not leave lengthy calculations and set offs to be made by the commissioner or clerk to ascertain the precise share of each; and especially the Chancellor will not require the clerk before issuing execution, to travel out of the record and examine papers not on file, to make such estimates. An auditor should be appointed to make the estimates, and report the estimates for the adoption or revision of the Chancellor. *Roberts' ex'rs.* vs *Dale et al*, 200.

5. In making distribution of property undisposed of by will, the Court ordering the distribution should not assume that the testator had not done equal justice in his advancements to his children, and direct an account to be taken of advancements, without a proper foundation laid by the pleadings, &c. *Floyd* vs *Floyd*, &c. 290.

See *Wills*, 1, 2, 14.

DIVISION OF LAND.

1. The statute of 1810, (2 *Stat. Law*, 1070,) authorizes the County Court to appoint commissioners to divide land between *parceners only*. Where one, therefore, holds part as parcener and part as tenant in common the Chancellor alone has power to divide. The parceners, or some one of them, must move the County Court to appoint commissioners to divide under the statute. The County Court in dividing lands, will consult the interest of all without prejudice to any, and lay off the part to which each is entitled, in such form and in one place, as will make it most valuable. *Gaithers* vs *Brown*, 21.

DOWER.

1. The County Courts have no jurisdiction to assign dower, except in cases where the husband died seized, and the right to dower is *admitted* or not *contested*. (4 *Bibb*, 462, *cited.*) *Murphey's heirs and devisees* vs *Murphey*, 233.

2. County Courts have no jurisdiction to try contested claims to dower. They may assign dower when the claim is not contested; but in no other cases. (4 *Bibb*, 462; 1 *J. J. Marshall*, 105; *ante*, 232.) *Garris' heirs* vs *Garris*, 461.

See *Forfeiture*, 1, 3, 4.

EJECTMENT.

1. To authorize a recovery in ejectment upon a Kentucky Land Warrant against a person holding under a Military entry, survey and patent, it is necessary that the plaintiffs show by *clear, satisfactory* and *unequivocal* evidence that the survey and patent under the Military entry, varies from the entry, and the extent of the variance. (2 *B. Monroe*, 217.) *Taylor* vs *Fletcher*, 86.

2. Where there is a joint and separate demise, and no joint right is proved, there can be no recovery upon the joint demise; but there may be upon the separate demise so far as a separate right is proved. *Riggs* vs *Dooley*, &c. 242-3.

3. It is not error to permit a declaration in ejectment to be amended by adding a demise in the name of part of the same lessors for the same lands before ap-

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EJECTMENT—*Continued.*

pearance; nor to permit an amendment after appearance if no other title than that relied upon in the original demise is to be offered in evidence. *Giltner, &c.* vs *Trustees of Carrollton*, 680.

See *Equity of redemption*, 1, 2. *Joint rights.*

ELECTION.

See *Exchange of land*, 1.

EMANCIPATION.

1. A testator provided in his will that if any of his slaves should become willing to give themselves up to embark for Liberia, that "*he thereby emancipated all such*"—Held that upon any one of the slaves electing to go and embark for Liberia, that such slave became entitled to his or her freedom, and that his or her emancipation had relation back to the death of the testator, and that issue born of such slave after the death of the testator, was also entitled to freedom. *Graham's ex'r.* vs *Sam et al.* 405.
2. The husband has the right to emancipate his slaves by will, irrespective of his widow's right to dower, and the renunciation by the widow of the provisions of the will of her husband, cannot impair the right of the slave emancipated by the will, to freedom. (1 *Dana*, 48.) *Ibid*, 405.
3. Where slaves are to be free by will, upon their surrendering themselves up to embark for Liberia, and receive $100 each, the Chancellor should appoint a commissioner to superintend the preparation to embark, after *election* made, and to pay over the money upon embarking, if the executor be not a suitable person to do so. *Ibid*, 405.

ENTRIES.

1. It is a valid entry which gives such description of its locality and shape, as will enable others who may desire to appropriate the adjacent land, to ascertain with reasonable certainty, what the locator has appropriated. It is the terms used in the entry and not the private intention or opinion of the locator which is to fix the location. *Camp* vs *Prather, &c.* 601.
2. An entry calling to begin at the intersection of a line running due south from the town of Columbia to the State line, which is a line of thirty six degrees thirty minutes north latitude, but which had not been run and marked, is a valid entry, at least from the time the boundary was fixed by the proper authorities. *Ibid*, 602-3.

EQUITABLE INTERESTS AND CHOSES.

1. Before a creditor can come into Chancery to compel a foreclosure of mortgages and have satisfaction out of any balance, he must have had judgment and a return of *nulla bona* against mortgagor. *Warner* vs *Everett*, 265.

EQUITY.

1. Equity will not interfere between parties in *pari delicto*. *Best* vs *Higginbotham*, 125.
2. Equity will not protect one in the enjoyment of that which he has obtained by a violation of law. *Collett* vs *Jones and Hall*, 587.
3. Can a judgment creditor attach, by bill in equity, a judgment at law which his debtor has obtained against another for the illegal sale of the only work beast of his debtor?—QUERIE. *Ibid*, 587.

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EQUITY AND EQUITABLE JURISDICTION.

1. The Chancellor has jurisdiction on bill by one in possession, to quiet the title to land possessed. *Hiatt's heirs* vs *Calloway's heirs*, 180.
2. Where a deed of conveyance was regularly acknowledged by *baron and feme*, and deposited for record in due time, but the Clerk in his certificate of the time of recording, committed an error, such error was corrected by the Chancellor; not by changing the record, but by decreeing a release of title, and perpetually enjoining any assertion of title by the grantors or those claiming under them. *Ibid*, 180.
3. The Chancellor will not entertain a bill by a lessee to compel the lessor to litigate with a stranger the right to the premises, and especially in a case where there is strong circumstances to induce the belief that the lessee obtained the possession for the benefit of the third person, to the prejudice of the lessor. *Williams* vs *Halbert, &c.* 185.
4. Nor will the Chancellor entertain a cross bill by such third person, filed in such a case, to try a title which is properly triable at law. *Ibid*, 185.
5. To authorize a creditor to come into chancery to ask the foreclosure of mortgages between the debtor and others, he must show that the legal remedy has been exhausted by judgment and *nulla bona* returned. *Warner* vs *Everett*, 265.
6. Upon decreeing partition, the Chancellor should decree conveyances to be made of the legal title in conformity to the division, to do so is a paramount ground of equity jurisdiction. To this end, the holder of the legal title should be before the Court. If the legal title cannot be at once decreed, the Chancellor may secure each part owner in the enjoyment of his part until the conveyances are made. (*Story's Equity, sec.* 652,) *Hunter, &c.* vs *Brown*, 284.
7. That a party has no legal remedy is a good ground of equitable jurisdiction. *Mattingly's heirs* vs *Corbit*, 376.
8. The Chancellor cannot relieve where the remedy was complete at law, and no good reason shown why the party did not avail himself of it. *Paynter, &c.* vs *Evans*, 420.
9. The Chancellor has power to decree a specific performance of the written promise of the father to convey land to the son, in consideration of natural love and affection. *Mahan, &c.* vs *Mahan*, 582.

See *Waiver of equity*, 1.

EQUITY OF REDEMPTION.

1. The purchaser of an equity of redemption under a sale under execution against the mortgagor, is entitled to possession as against the mortgagor, and may maintain ejectment. (8 *Dana*, 198; 2 *B. Monroe*, 63.) *Abel* vs *Wilder & Co.* 531.
2. But the purchaser cannot assert his right to possession, nor bring ejectment, nor claim the rent, until the day of redemption has passed. *Ibid*, 532.
3. Neither the sale and conveyance by the Sheriff, of the equity of redemption, nor a subsequent conveyance by the mortgagor, carries with them the right to the rent accruing subsequently to the sale, secured by a note and previously assigned to a third person. *Ibid*, 533.

ERROR *CORAM VOBIS.*

1. The statute of 1803, (2 *Stat. Law*, 1555,) requiring notice of application for writs of error *coram vobis*, does not apply to a case where the object of the writ is to contest the validity of the judgment, nor is it necessary in such case, to produce a copy of the bonds and execution. *Breckinridge* vs *Coleman*, 332.

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ERROR *CORAM VOBIS—Continued.*

2. Justices of the Peace in Kentucky, in virtue of their common law jurisdiction, have power to award writs of error *coram vobis* whenever that is the appropriate remedy to correct errors in their own Courts, independently of the statute conferring jurisdiction to grant such writs on Justices, to be designated by the County Courts. *Breckinridge* vs *Coleman*, 333.
3. The statute of 1802, limiting the time of prosecuting writs of error *coram vobis* to correct errors in replevy bonds, does not apply to writs of error *coram vobis* to correct an invalid judgment. (3 *J. J. Marshall*, 563.) *Ibid*, 333.
4. Upon the trial of a writ of error *coram vobis* before a Justice of the Peace, upon a question as to the validity of the judgment, the Justice should only try and decide the matter in controversy, and not forthwith proceed to re-try the case as an original case. *Ibid*, 335.
5. The statute requiring writs of error *coram vobis* to be tried at the first term, does not apply to trials on appeals, nor to trials before Justices not given by the statute, but existing in virtue of their common law jurisdiction. *Ibid*, 335.

ESTOPPAL.

1. A master who permitted his slave to go at large and trade as a free man, declaring that he had nothing to do with him, cannot maintain an action against a public officer for levying executions upon property found in the possession of, and which had been acquired by the slave. *Naylor* vs *Hays*, 477.

EVIDENCE.

1. Commissioners' books are evidence against persons whose property is there listed for taxation, without proof that the list was actually sworn to, on it being shown that the commissioner was absent from the State, and that the books are in his hand writing. *Sutton* vs *Floyd*, 4.
2. In a suit by assignee against assignor, proof by the assignor that the debtor had property mortgaged worth more than the debts provided for by the mortgage, is competent to exonerate the assignor from liability on the assignment. *Levi* vs *Evans*, 116.
3. Where the issue between the relatives of a supposed wife and a supposed husband, in a contest for property, depends upon proof of marriage, a marriage in fact must be proved—cohabitation and the recognition of the parties of each other as man and wife, will not be sufficient. *Kuhl* vs *Knaner*, 132.
4. In an action of ejectment the record of a former suit between the same parties in trespass, respecting the same land, involving the same questions, is competent evidence. (*Starkie*, 201, *note n*; *Ibid*, 204.) *Pleak* vs *Chambers*, 567.
5. To show title to land under a sale and deed of Sheriff, it is necessary to show the judgment and execution. *Riggs* vs *Dooley*, *&c.* 239.
6. This Court approve, as a general rule, that comparison of hand writing is not competent evidence. *McAllister* vs *McAllister*, 270.
7. There are exceptions: 1st, Where writings are of such antiquity as not to be susceptible of proof in the ordinary way, yet not so old as to prove themselves. 2d, Where other writings clearly proved, are already before the jury, they may compare—there may be other exceptions. *Ibid*, 270.
8. Evidence though not of the highest grade, admitted in the Circuit Court and heard without objection, will not be rejected by the Court of Appeals. *Jarboe* vs *McAtee's heirs*, *&c.* 279.

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EVIDENCE—*Continued.*

9. Proof of the customary duties performed by those engaged in any particular service at any particular place which is reasonable, is legitimate evidence in cases involving the question of the rightful discharge of that duty. *Vaughn's ex'r.* vs *Gardner*, 330.
10. Where the vendee left slaves purchased, in the possession of vendor, the conduct of vendor in regard to the exercise of acts of ownership over them, in a contest by the purchaser with the creditors of vendor, was proper evidence to go to a jury to enable them to determine the validity of the sale. *Kendall* vs *Hughes*, 372.
11. If evidence of an inferior grade be adduced and heard without objection, it is error in the Court to direct the jury to disregard such evidence in their deliberations upon the case. *James et al.* vs *Langdon*, 197.
12. Settlements made with county collectors are good evidence in motions against their sureties. (3 *B. Monroe*, 195.) *McGuire* vs *Justices of Owsley County*, 343.
13. The confessions of a principal, made long after his term of office has expired, are not evidence against his surety in his official bond. (*Greenleaf on Evidence*, 219.) *Commonwealth, for Russell* vs *Brassfield*, 447.
14. Parol evidence is inadmissible to vary the terms of a written contract, unless there be fraud, mistake or usury in the contract; but when the parties admit that the contract was otherwise than as appears by the writing, the rule has no application, nor does the rule apply to strangers to the writings. (1 *Greenleaf*, 337; *Starkie*, 576.) *Strader* vs *Lambeth*, &c. 590.
15. The deposition of one of several obligors in a bond given for the performance of a decree which might be rendered upon an attachment levied upon a steam boat, or the deposition of one of the owners of such boat, is incompetent evidence for the defendant. *Strader*, &c. vs *Graham*, 635.
16. A guardian is not an incompetent witness to prove the capacity of one who had been his ward, to make a will. *Howard et al.* vs *Coke*, &c. 660.

See *Bills of Exchange*, 2, 3, 5. *Wills*, 5, 7, 8. *Practice in Suits at Law*, 3, 5, 6, 7.

EXCHANGE OF LAND.

1. Husband and wife exchanged the lands of the wife for other lands; a conveyance was made which was ineffectual to pass the wife's legal estate; the husband died leaving the wife in possession of the land received; she died leaving heirs, infants and adults: the adults are willing to affirm the contract of exchange. The Chancellor, in this state of case, should suspend the disposition of the case until the infants arrive of full age, and then compel them to elect. *Kemper* vs *Hughes*, &c. 257.

EXECUTIONS.

1. The Chancellor has no jurisdiction to interfere to stay proceedings upon an execution issued upon a delivery bond taken under an execution endorsed "no security of any kind to be taken," a Court of law is competent to render full redress upon writ of error *coram vobis*, or motion to quash the execution. *Poston*, &c. vs *Southern*, 229.
2. Though execution be levied on property, the debtor may sell subject to the execution lien. So may a defendant sell property attached by order of the Chancellor, subject however, to the attachment lien. (2 *Marshall*, 351; 5 *Dana*, 271.) *Warner* vs *Everett*, 266.

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EXECUTION SALES.

1. A purchaser of land sold under execution, is entitled to the immediate possession; the defendant in execution is not a tenant or *quasi* tenant of the purchaser, nor entitled to notice to quit. *Snowdon* vs *McKinney*, 259.
2. —So the vendee of a purchaser is entitled to the same rights and remedies to enforce them as the purchaser; a sale of land under execution is not in violation of the laws against champerty. *Ibid*, 259.
3. The right of a purchaser under a sale by execution, is not invalid because the judgment under which the execution issued is afterwards reversed. *Brown, &c.* vs *Combs, &c.* 320.
4. A sale was made of land under execution, the Sheriff conveyed and the purchaser gave his negotiable note to the plaintiff in the execution, and the sale bonds were returned satisfied—Held that the purchaser by agreeing to convey the land to vendee of the defendants in the execution upon the reversed judgment, could not be relieved from the payment of his negotiable notes to plaintiff in the execution. *Ibid*, 319-20.
5. The levy of an execution upon a large tract of land, part of which had been laid off for a town into lots and vested in trustees, and describing the land, and selling it as the tract, upon which the town had been established, or as including the town, does not import a sale of the proprietor's interest in the town. *Wickliffe* vs *Bascom, &c.* 690.

See *Cestui que trusts*, 1.

EXECUTORS AND ADMINISTRATORS.

1. Administrators who give a joint bond, are liable for the acts of each other—the sureties are also liable for each. *Collins, &c.* vs *Carlisle's heirs*, 14.
2. Two administrators gave a joint bond, with sureties—one administrator died, the survivor and sureties were sued for distribution—Held that there was a joint liability to the extent of the whole estate, regarding the survivor and sureties as liable for what came to his hands and the sureties and survivor, for that which came to the hands of the deceased administrator. *Ibid*, 15.
3. An authenticated copy of a certificate of probate, is sufficient evidence of a rightful appointment of an executor in another State. *Smith* vs *Roack's ex'r.* 17.
4. The sureties of administrators are not liable for rents of land which the administrators, as such, had no right to receive, not being assets. *Smith, &c.* vs *Bland*, 22.
5. Nor can a County Court be made liable for taking insufficient security from an administrator, but upon it being shown that the plaintiff has been injured by the failure to take good security. *Ibid*, 22.
6. An administrator with the will annexed may, under the authority of the statute of 1810, (1 *Stat. Law*, 671,) sell and convey lands devised to be sold for the payment of debts, where trustee refuses to act. *Owens, &c.* vs *Cowan's heirs*, 157.
7. The conveyance of an administrator with the will annexed, made after he is superceded by another administrator, passes no title, except such as he may have independently of his character as administrator *cum testamento*. *Ibid*, 157.
8. Does the statute authorize the plaintiff, who brings a suit against an administrator who is afterwards removed, and the suit revived against the administrator *de bonis non*, still to prosecute the suit against the removed administrator—Qu.

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EXECUTORS AND ADMINISTRATORS—*Continued.*

If it does there should be some evidence of the intention so to prosecute it, placed upon the record. *Anderson's adm'r.* vs *Irvine*, 209.

9. Executors and administrators should be allowed in their accounts, for taxes paid on the property in their custody, and commissions on the hire of slaves, &c., as well as all legal expenses of administration. *Floyd* vs *Floyd*, *&c.* 292.

EXEMPTED PROPERTY.

1. A creditor sold the only work beast of his debtor under execution, he and the Sheriff were sued and a verdict recovered for the value of the work beast, the creditor enjoined the same and asked that it might be set off against his debt—Held that it could not be done. *Collett* vs *Jones and Hall*, 586.

FELONS.

1. The estate of felons is not forfeited upon conviction, but by the act of 1802, (2 *Stat. Law*, 1309,) the wife and children are to be supported, the rights of creditors regarded, and the remainder belongs to the offender on his release. *Wooldridge* vs *Lucas*, 50.

See *Forfeiture*, 1, 2, 3, 4.

FEMES COVERT.

1. The statute of 1814 allows only three years after disability removed, for *femes covert* to sue for land *devised or descended* to them during coverture, instead of ten years allowed by the statute of 1796. (5 *Dana* 412; 1 *Marshall*, 377, *cited.*) *Riggs* vs *Dooley*, 240.
2. A *feme covert* executed a note as the surety of her son, she having separate estate, it was held that such was, *pro tanto*, a charge upon her separate estate in the hands of her trustee, which might be subjected by the Chancellor. *Jarman, &c.* vs *Wilkerson*, 293.
3. In this case the *feme covert* was sued at law and permitted judgment to pass by default, execution issued and was returned *nulla bona*—Held that the case was brought within the provisions of the statute of Kentucky authorizing the Chancellor to subject equitable interests to execution. *Ibid*, 294.
4. The release of errors of a *feme covert* is invalid, though her husband may be a party to the bill. *Breckinridge* vs *Coleman*, 333.
5. The separate estate of a *feme covert* cannot be reached by a proceeding at law. *Ibid*, 334.
6. The equity of a *feme covert* to have a settlement out of property coming from her father's estate, does not depend upon the solvency or insolvency of the husband, nor upon the support she may receive from him. The Chancellor regards the estate in equity as belonging to her, and her equity to a support to be secured to her and her children, as superior to that of the husband or his creditors, who occupy no better condition than the husband. *Hays* vs *Blanks*, 348.

FINES.

1. Two fines cannot be imposed though two offences be proved, when one only is charged. *Bridgeford* vs *City of Lexington*, 49.

See *Attornies for the Commonwealth*, 1, 3.

FORFEITURES.

1. The estate of felons in Kentucky, is not to be forfeited upon conviction; but the right of the wife of a convicted felon to alimony, and the right of her chil-

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FORFEITURES—*Continued.*

dren to support, and the right of creditors is recognized by the act of 1802, (*Stat. Law*, 1309,) and the right of the offender after release from imprisonment, to what has not been disposed of for either of the above purposes, is complete. *Wooldridge* vs *Lucas*, *&c.* 50.

2. The 20th sec. of the 10th article of the Constitution of Kentucky, abrogates so much of the common law forfeitures to the Commonwealth as affect the inheritance, leaving it in force only so far as it may operate upon the estate during the life of the offender. *Ibid*, 50

3. By the statute of 1802, (*Stat. Law*, 1309,) the estate of felons is relieved from forfeiture, but the wife's right to alimony, the support of the children of the convict, and his creditors, are recognized; and the right of he offender after release from imprisonment, to what has not been disposed of for either of these purposes, is complete. *Ibid*, 57.

4. The provisions of the statute of 1802, respecting the estates of convicted felons, is repugnant to the idea, that upon the conviction of the husband, the right to dower in the wife is complete. And the provision for the appointment of guardians to the infant children, repels the conclusion that the rights of the father upon conviction for felony, descend to the children as if he had died intestate, and so is the provision that his estate shall revert to him upon his release. *Ibid*, 52.

FORMER ADJUDICATIONS.

1. The acts of a Court of competent jurisdiction in a contest between the same parties, or those whom they represent, so far as they purport to be conclusive between the parties, are to be so regarded. *Hardin and wife* vs *Smith's ex'rs.* 400.

FRAUD.

1. A deed procured by imposing upon a feeble minded old man, who was illiterate, by one in whom he reposed great confidence, for an inadequate consideration, declared fraudulent and void. *James et al.* vs *Langdon*, 195.

FRAUDULENT CONVEYANCES.

1. The fact that a purchaser of property has knowledge that the vendor, by the sale of the property, intends to delay, hinder or defraud all or any of his creditors, is not conclusive evidence of the fraudulent intent of the purchaser to aid the vendor in his fraudulent intent of hindering, delaying or defrauding his creditors, rendering the sale void. (*Ford* vs *Williams*, 3 *B. Monroe*, 554.) *Brown* vs *Foree*, *&c.* 358.

2. —But when the vendee actually pays a full and fair price for his purchase, a considerable portion of which goes to discharge the debts of the vendor, and for which the vendee is surety, these facts furnish strong evidence to authorize the conclusion that the intent of the purchaser was rather his own security than to defraud the creditors of the vendor. The facts should all be left to the jury to enable them to decide upon the intent of the purchaser in making the purchase. (5 *B. Monroe*, 308.) *Ibid.* 358.

3. The intent to defraud the creditors of the vendor, to make the sale, fraudulent, must exist with the purchaser as well as on the part of the vendor, and the sale be the means of carrying out that intent. The fact of the knowledge on the part of the purchaser, of the vendor's fraudulent intent, is not always conclusive evidence of the purchasar's participation in that intent. *Ibid*, 359. *Brown* vs *Smith*, 362.

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FRAUDULENT CONVEYANCES—*Continued.*

4. But it creates a presumption which will authorize the conclusion of a fraudulent intent on the part of the purchaser, unless repelled by facts and circumstances showing a lawful inducement to the purchase. *Kendall* vs *Hughes*, 369
5. To instruct the jury that the fraudulent intent of the party cannot be presumed, but must be proved, decided to be misleading. Fraud may be presumed if there be sufficient evidence of other facts which will authorize the inference of fraud. *Ibid*, 370.
6. A sale may be good, as between vendor and purchaser, and pass the title as to all the world except *creditors* and purchasers, as to whom it may be fraudulent, any instruction, therefore, in conflict with this principle, is wrong. *Ibid*, 371.
7. A deed by a husband, though in failing circumstances, conveying in trust for the separate use of the wife, the property to which she was in law entitled as heir or distributee of her father, which had not been reduced to possession by the husband, was not fraudulent. *McCauley* vs *Rodes and Macklin*, 462.
8. Though a fraudulent vendee can not be compelled to re-convey to his fraudulent vendor, yet if he do so before any lien be acquired by his creditor, such creditor cannot reach the property. *Clark's adm'r.* ve *Rucker*, 585.

See *Assignment of Deeds*, 1,

GAMING.

1. The betting of checks or counters at a Faro Bank, which are agreed by the parties to represent money or bank notes, and for which money or bank notes is to be paid by either party, is a violation of the statute, and if proved, sustains the charge of keeping a Faro Table at which money and bank notes were bet. *Ashlock* vs *Commonwealth*, 45.
2. Five hundred dollars is the fine for keeping a Faro Bank. *Ibid*, 47.
3. After the lapse of six months, one of several loosers at unlawful gaming, may sue to recover the property lost; a stranger may do so under the statute of 1833, but may not recover the value thereof, unless the property cannot be had. *Morgan* vs *Lewis*, &c. 243.
4. The statute of 1833, authorizes a recovery of *the property* from the winner, not its value, unless the property cannot be had, and after the lapse of six months, the loser may sue as well as a stranger. But *case* is not the appropriate remedy to recover property. *Ibid*, 243.
5. Debt, detinue or case, may be adopted under the statute, whichever may be most appropriate; and debt being given by a former statute, may be maintained for *money* or property, or detinue or case as the facts justify. The mere failure to deliver property will not support the action on the case and convert property into money. *Ibid*, 244.

GIFTS.

1. A gift of slaves, though it be in writing, passes no title, unless the writing be recorded or the possession accompany the gift. (2 *Stat. Law*, 1480; 7 *J. J. Marshall*, 202; 5 *Dana*, 306.) *Mahan*, &c. vs *Mahan*, 583.

GIFTS BY PAROL.

1. A gift by a father to his daughter, of a negro, where the possession remains with the donor, is invalid, the gift is directly within the evils intended to be prevented by the 41st sec. of the statute of 1798, (2 *Stat. Law*, 1497.) *Irvine* vs *Rousseau*, 234.

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GRANT.

1. A grant from the Commonwealth will be presumed after a lapse of 50 years, possessors during that time claiming as owners. (3 *Starkie*, 1221; *Greenleaf*, 50.) *Jarboe* vs *McAtee's heirs*, &c. 280.
2. In New York, where there had been an order of counsel for the survey, and a survey actually made, 40 years was held to create a presumption that a grant had issued. (10 *Johnson*, 377.) *Ibid*, 280.

GUARDIAN AND WARD.

1. Contracts between guardians and their wards, immediately after they become of age, are regarded with suspicion by the Chancellor, and if found to have been made with a view to speculation, or with the appearance of the least unfairness, will be disregarded and annulled. (1 *Story's Equity*, 313.) *Richardson*, &c. vs *Linney*, 573.

GUARANTY.

1. To authorize a recovery upon a general letter of guaranty, it is necessary not only that the guaranty be accepted, the credit given upon the faith of the guaranty, but that the guarantor be notified in a reasonable time, of the credit given, its extent and terms, and that the guarantor would be looked to for performance thereof. *Kincheloe* vs *Holmes*, &c. 6.
2. Without due notice of the acceptance of a guaranty, no notice of diligence by suit, in pursuing the principal, and giving notice of his failure to pay, will render the guarantor responsible. But after due notice of the acceptance, &c. of guaranty, any particular notice of the proceedings against the principal, may not be necessary, nor any greater degree of vigilance required in pursuing the principal, than a man of ordinary vigilance would exercise in his own business, *Ibid*, 11.

HUSBAND AND WIFE.

1. According to the civil code of Louisiana, a voluntary separation of property between husband and wife, is void as respects the husband and wife, as well as third persons. *Beard's ex'rs.* vs *Bayse*, 137.
2. A woman, owner of slaves, residing in Louisiana, married there and was removed by her husband to Kentucky, where she sued for alimony. The suit was compromised by the professed agents of the parties, and part of the wife's slaves surrendered to the husband—Held that the right of the wife to the slaves surrendered to the husband, was not impaired by the compromise, which was not made the decree of the Court.

   The agents of the wife having authority to conduct the suit, had no authority to alienate the property in contest. *Ibid*, 139.
3. The interest of the wife in her dotal or separate property by the laws of Louisiana, cannot be passed to the husband by contract between husband and wife, without the sanction of the Judge. *Ibid*, 140.
4. The right of the wife to property to which she is separately entitled by the law of the State where the marriage takes place, is protected in Kentucky, though the husband and wife remove to Kentucky; and on the death of the husband, the right of the wife to her dotal property is clear as it existed at the date of the marriage. *Beard's ex'rs.* vs *Bayse*, 141.
5. If chattels be bequeathed to the separate use of the wife, though the legal title vest in the husband, equity will regard the husband as trustee for the wife.—Argu. *Ibid*, 145.

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HUSBAND AND WIFE—*Continued.*

6. The husband and wife were sued jointly in trespass, assault and battery, though not so named in the declaration; if the evidence prove such relation, it is no cause of arresting the judgment, *Phillips* vs *Phillips*, &c. 268.
7. If the wife commit an assault and battery in presence of the husband, to which he assents, they are jointly liable. A jury may infer the assent of the husband from his presence, or other acts. *Ibid*, 268.
8. A vested remainder in the slaves of the wife, do not vest in the husband, unless reduced to possession during the life of the husband, but survive to the wife, and not to the representatives of the husband: (1 *B. Monroe*, 152; 4 *Ibid*, 236; 5 *Ibid*, 556. *Ring*, &c. vs *Baldridge*, 536.
9. The husband and wife cannot make any contract with third persons, during the coverture, disposing of the expectancies of the wife, which will be binding on the wife after the death of the husband. *Hardin and wife* vs *T. Smith's ex'rs.* &c. 392.
10. The loss of the wife's right to survivorship in her choses in action, does not necessarily deprive her of her right in equity, to a settlement. (3 *Vez.* 506; 4 *B. Monroe*, 235.) *Basham* vs *Chamberlain*, 445.
11. A contract before marriage, that the wife shall enjoy her property separately, is valid, and the husband will be regarded as trustee for the wife's benefit. And the personal savings and profits made by the wife, the results of her industry and economy may, with the assent of the husband, be applied to her seperate use, so far as the rights of the husband and his representatives are concerned, but not against his creditors. Personal property in possession of the wife at the marriage, vests absolutely in the husband: the proceeds of her labor belong to him, which he cannot *voluntarily* dispose of to the prejudice of his creditors; but upon good consideration he may make a settlement upon the wife even after marriage. *Ibid*, 445.
12. A wife wrongfully turned out of doors by her husband, carries with her an implied credit and authority to charge her husband for necessaries. *Billings* vs *Pilcher and Hauser*, 159.
13. —But those who trust the wife who has separated from her husband, must look to the causes of such separation—they trust the wife on the credit of her husband at their peril, if the causes of separation did not justify the wife. *Ibid*, 460.
14. It is the right of the wife exclusively, to have a settlement out of her property, and to be enforced at her instance whether she be a complainant or a defendant, in a suit in which the Chancellor is called upon to act. But the wife may agree that the fund shall be paid to the husband, if she be capable of assenting. *Taylor and wife* vs *Anderson's ex'r.* 552.
15. The husband and wife united in a bill for the wife's property, praying that it be paid to the husband, and it appearing that he was industrious and prudent, managing his property well, and living in harmony with the wife—Held that the Chancellor, on the wife being of full age and consenting in open Court, should decree its payment to the husband. *Ibid*, 553.

See *Settlement*, 1, 2. *Assault and battery*, 1. *Comity.*

INDICTMENT.

1. In an indictment for importing slaves into the State contrary to the provisions of the statute of 1833, it is not necesary to state in the indictment that the defendant does not come within the exceptions, or negative the provisos con-

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INDICTMENT—*Continued.*

tained in the statute; these are matters of defence which more appropriately come from the defendant. *Commonwdalth* vs *Young*, 2.

2. An indictment commencing in the name of *the Commonwealth of Kentncky*, and professing to proceed *by authority of the Commonwealth of Kentucky*, and concluding *against the peace and dignity of the Commonwealth*, without adding *of Kentucky* or *aforesaid*, is good. *Ibid*, 3.
3. In an indictment under the statute of 1840, (3 *Stat. Law*, 225,) for removing or attempting to remove any person of color, (having a suit for freedom,) out of the State, it is necessary to aver that the defendant had knowledge of the pendency of such suit. *Commonwealth* vs *Stout*, *&c.* 247.
4. Where the statement of an act itself necessarily includes a knowledge of the illegality of the act no averment of an unlawful intent, is necessary. *Ibid*, 249.
5. Stating an offence in the words of the statute, creating or prohibiting an offence, is not sufficient, unless every fact necessary to constitute the offence, is charged or necessarily implied, by following the words of the statute. *Ibid*, 249.

INFANTS REAL ESTATE.

1. Where a sale was made by the decree of the Chancellor on petition filed, and possession taken and held for near four years, a deed made and accepted, without objection, no allegation of fraud, and ability to convey a valid title at the filing of the answer to the bill of vendee filed for a rescision, and a desire expressed by vendors, the heirs, all of full age except one at the date of the deed, he at the filing of the answer—Held that there should be no rescision of the contract, though the sale may have been irregular or even erroneously decreed in the first instance. *Lampton* vs *Usher's heirs*, 60.
2. Though a petition for a sale of infants real estate, held by descent, be filed by *procken ami* without affidavit thereto, and without any appointment of commissioners to appraise the infants estate, and without the execution of the bond prescribed by the statute—yet if the statutory guardian be a party to the proceeding, and unites in the prayer for the sale, (9 *Dana*, 256; 3 *B. Monroe*, 167.) these irrigularities present no obstacle to the confirmation of the sale by the heirs when of full age, and the subject still be within the power of the Chancellor. *Ibid*, 61-2.
3. Where infants petition by next friend, for the sale of real estate descended, and make the statutory guardian of other heirs a party to the proceeding, and they unite in the prayer for sale, they will be considered as petitioning for the sale; and the fact of their being guardians may be shown by other testimony than that contained in the record in a suit to rescind the contract of purchase. *Lampton* vs *Usher's heirs*, 63.
4. Where a purchaser at a sale of infants' real estate had been put in possession of his purchase, enjoying it near four years, and improved it, and where a deed had been made and confirmed by the Court, as the record says *by* consent, the Court took these facts as satisfactory to show an *acceptance* of the deed. *Ibid*, 64.
5. Two guardians of infants unite in a petition for the sale of the real estate of their wards, one only swear to the petition—Held to be a substantial compliance with the statute. *Owens*, *&c.* vs *Cowan's heirs*, *&c.* 155.
6. The sale of the real estate of infants is not invalid, because the guardian did not execute bond as required by the statute, before the decree or sale, if the proceeds of the sale was still in the power of the Chancellor, who should secure the

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INFANTS' REAL ESTATE—*Continued.*

fund to the ward by appropriate bonds, before suffering it to pass into the hands of the guardian. *Ibid*, 156.

7. A petition for the sale of real estate in the name of the infant by his guardian, is a substantial conformity with the statute, and equivalent to a petition in the name of the guardian. *Richardson* vs *Parrott's heirs*, 381.
8. An adult having an interest, may unite with the guardian of the infant, in a petition for the sale of infants' estate, his assent thus shown will be as effectual as if given by answer. *Ibid*, 381.
9. That the petition in such case was not sworn to, will not render a sale of infants' real estate invalid (3 *B. Monroe*, 176; 7 *Ibid*, 61.) *Ibid*, 382.
10. Infants' real estate being sold upon credits, the purchaser paid one instalment and for the residue gave his bonds and mortgages to the adult heirs and the guardians of the infants, and they passed their receipts to the commissioners of the Court, who conveyed to the purchaser, who accepted the deed, which was confirmed by the Court—Held that the legal title passed by the commissioners' deed. *Ibid*, 382.
11. In the sale of infants' real estate ender the statutes of Kentucky, only their legal and equitable title is sold, and that alone can be conveyed, no warranty can properly be added against adverse titles. *Ibid*, 384.

INJUNCTIONS.

1. When upon bill filed by a vendee to perfect his title, the payment of purchase money is injoined on the ground of the defect of title, and the title is perfected at the hearing after the filing of the bill, there should be no damages awarded upon the dissolution of the injunction. *Lampton* vs *Usher's heirs*, 66.

INSTRUCTIONS.

1. There is no error in refusing instructions to the jury which are abstractly correct, if the proof does not conduce to prove the state of case supposed by the instructions asked. *Sutton, &c.* vs *Floyd*, 4.
2. Instructions to the jury should not assume facts which it is the province of the jury to ascertain; but should be hypotheticated upon the belief of the jury from the evidence of the fact supposed, and should not assume that plaintiff is entitled to recover upon their belief from the evidence of part only of the facts necessary to authorize the recovery. *Kendall* vs *Hughes*, 371.
3. In questions involving fraud in a purchase of property of the debtor, where the purchaser is plaintiff, to instruct the jury to find for the plaintiff, if they find the property to belong to the plaintiff, is misleading. It may be the property of the plaintiff as to all the world, except creditor purchasers, as to whom the plaintiff may have no right to recover. *Ibid*, 371.
4. The Court may properly qualify any instructions asked by the parties, by stating other considerations which the jury should take into view in deciding the questions before them, to prevent the jury from being misled in the instruction proposed. *Pleak* vs *Chambers*, 569.
5. A reference in an instruction to the jury, to facts, though stated in the declaration, which should not be considered as constituting a ground of recovery, may mislead the jury, and therefore should not be made. *Swigert, &c.* vs *Graham*, 668-9.

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INSURANCE.

1. In policies given by the Kentucky and Louisville Insurance Company, must be set forth the nature and extent of the interest of the assured in the property insured, together with every circumstance calculated to affect that interest, otherwise the policy will be invalid. *Addison & Clendenin* vs *The Kentucky and Louisville Insurance Company*, 473.
2. If the circumstances affecting the value of the property insured be omitted in the policy by the fraud of the agents of the company, may not the company be liable in equity, notwithstanding the omission?—QUERE. *Ibid*, 473.
3. Neither the master of a steamboat, nor one joint owner, can procure insurances for a steamboat for any interest in the boat but their own. *Patterson, &c.* vs *Chalmers*, 599,

INTEREST.

1. There is no uniform rule for fixing rests, and calculating interest against executors and other fiduciaries. The length of time between the rests should depend upon the circumstances of each particular case. *Clemens* vs *Caldwell*, 176–7.
2. The Chancellor may properly decree interest upon a liquidated account secured by mortgage. *Richardson* vs *Parrott's heirs*, 386.

See *Tender*, 1.

JEOFAIL.

1. The statute of 1799, (2 *Stat. Law*, 875,) does not apply to misjoinder of counts, nor does that which makes a verdict good, if there be one good count and others bad. *Vaughn's ex'r.* vs *Gardner*, 328

JOINT RIGHTS.

1. Joint rights are not protected by the statute of 1814, unless all be under disability at the time the right accrued. *Riggs* vs *Dooley, &c.* 240.
2. But if at the time the right accrued, there was no adverse holding, the adverse possession taken after the accrual of the right, would only prejudice the right of the joint owners when it should be continued so long as to toll the right of entry, after disability of all are removed. (1 *Marshall*, 38, 70; 3 *J. J. Marsh.* 98, *cited.*) *Ibid*, 241.
3. When all the joint owners are under disability at the time the right accrues, all are protected until the disability of all is removed. (3 *B. Monroe*, 147, *cited.*) *Ibid*, 242.

JURISDICTION.

1. The Circuit Court of a county where a debtor of a non-resident debtor resides, has jurisdiction to attach a fund in the hands of such person, to satisfy a creditor, no other Court has, unless the process be served within its jurisdiction. *Roberts* vs *Walker and Embree*, 75.
2. It is the power of the Court over the subject sought to be subjected, that gives the Chancellor jurisdiction on bill of attachment, not the service of process on the principal debtor nor the service of process on the garnishee in a different county from that in which the suit is brought. *Ibid*, 76.
3. When an attachment is brought in chancery in a wrong county, it is ineffectual to bind a fund in the hands of the defendant, unless the bill be taken for confessed or answer filed, not insisting upon, but waiving the question of jurisdiction. *Ibid*, 77.

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JURISDICTION—*Continued.*

4. The heirs or administrator of the committee of a lunatic, may be sued in any Circuit in which they may be found, by the administrator or other representative of the lunatic, and the jurisdiction is not confined to the Circuit to which the lunatic belonged. *Hardin and wife* vs *Smith's ex'r.* 398.

JUSTICES OF THE PEACE.

1. Justices of the Peace may hold their Courts and decide causes at other times than at their quarterly Courts, in the cases mentioned in the 4th and 12th sections of the act directing quarterly Courts. (*Session Acts*, 78;) and if they do hold such Courts, it may be shown that they done so under a state of case warranted by the statute. *Roberts, &c.* vs *Hall*, 350.
2. Justices of the Peace had authority by the statutes of 1785 and 1796, to take the acknowledgment and privy examination of *femes covert*, to deeds for land in the counties of the residence of the grantors but their names and seals were essential to their certificate to make the conveyance effectual. *Kemper* vs *Hughes*, 256.

LANDS, SALES OF.

1. The lands of one who held as a *cestui que trust*, descended to his heirs—Held that such lands so held, were liable to sale under executions upon judgments against the heirs in the same way that they were liable to sale under executions upon judgments against the ancestor. (3 *Bibb*, 186.) *Blanchard, &c.* vs *Taylor's heirs*, 649–50.
2. Land belonging to the defendant in execution, though held adversely by another, is liable to sale under execution. (1 *Dana*, 211; 6 *B. Monroe*, 374.) *Ibid*, 649–50.

LANDS DEVISED.

1. Can lands devised to be sold for the payment of debts be sold under execution on judgments against the heirs—QUERE. (*Helm* vs *Darby*, 3 *Dana*, 185.) *Owens, &c.* vs *Cowan's heirs*, 158.

LAPSE OF TIME.

1. The Directors of the Railroad Company may rely upon the lapse of time to shield themselves from liability to the creditors of the company for dividends improperly paid out. *Railroad Company* vs *Bridges*, 863.
2. The Court refused, after a great lapse of time, to overhale an old partnership dealing and settlement, upon the grounds of fraud and embezzlement by one partner, without clear and satisfactory evidence. *Winter* vs *Wheeler*, 26.

LEGISLATION.

1. If the Legislature have not power to pass a retrospective statute of limitation, they cannot delegate to the Courts of Chancery the power to apply such a principle to divest a right in a citizen *Pearce's heirs* vs *Patton*, 168.

LEXINGTON CITY COURT.

1. The exclusive jurisdiction conferred upon the Lexington City Court, to hear and determine cases of breaches of the penal laws of the State, except felonies, did not deprive the Fayette Circuit Court of the power to hear and decide all cases then pending in that Court for breaches of the penal laws. *Ashlock* vs *Commonwealth*, 45.

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LEXINGTON CITY COURT—*Continued.*

2. The exclusive jurisdiction conferred upon the City Court of Lexington, to hear and determine cases for breaches of the penal laws of the State except felonies, did not deprive the Fayette Circuit Court of the right to determine all cases then pending in that Court for breaches of the penal laws. *Ashlock* vs *Commonwealth*, 45.
3. A warrant issued by the Clerk of the City Court of Lexington, "for presuming to sell by retail without a license so to do, any quantity of wine, brandy, whiskey," &c. is too indefinite a charge to authorize a judgment by the City Court under the ordinance which makes it a penal offence "to sell by retail less than a quart." *Bridgeford* vs *City of Lexington*, 48.

See *Retailing spirits*, 1.

LEXINGTON AND OHIO RAILROAD COMPANY.

1. The statute incorporating the Lexington and Ohio Railroad Company, imposes no personal liability on the Directors for the payment of the debts of the company. If any arise, it must be the result of their wrongful acts, when an action on the case would be the appropriate remedy, to which the statute of limitation might be pleaded. *Railroad Company* vs *Bridges*, 560.

LIBEL.

Words when written, which tend to degrade, disgrace or render odious or ridiculous the person of whom they are spoken, are libelous and consequently actionable. (*Litt. Sel. Cases*, 188.) *Shelton* vs *Nance*, 129.

2. The defendant composed, published and caused to be written in the Church book the following: "A report raised and circulated by Wm. Shelton, the plaintiff, against brother Nance, stating that he, Nance, made him, Shelton, pay a note twice, and proved by Shelton to be false"—Held to be libelous and actionable. *Ibid*, 129.

LIEN.

1. A vendor has a lien for a balance of the consideration for land sold, though a conveyance be actually made, if the sub-purchaser have either actual or constructive notice that the same remains due. *Woodward* vs *Woodward*, &c. 117.
2. A vendor remaining in possession of land sold and conveyed, is sufficient to put a subsequent purchaser of vendee upon enquiry as to the payment of the purchase money. *Hopkins*, &c. vs *Garrard*, 313.
3. A vendee may sell land which he has purchased, though there be a suit pending to subject it to the payment of the purchase money. The purchaser will take subject to the equity of the complainant to be paid his purchase money. *Ibid*, 313.
4. In a proceeding under the statute of 1838, the power of the Chancellor to subject property to the payment of the debts of the defendant, does not depend upon the actual levy of an attachment—a lien attaches on the property sought to be subjected, on filing the bill and service of process. *Milward*, &c. vs *Cochran*, &c. 346.
5. —If the property sought to be subjected, be previously levied upon by execution, the Chancellor may follow and subject any surplus after the execution is satisfied, in the hands of third persons who may receive it after the *lis pendens* exist. *Ibid*, 346.

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LIEN—*Continued.*

6. One who was not owner but claiming a lien for work, &c. united in a conveyance to a purchaser—Held to have thereby waived his lien. *Alexander, &c.* vs *Slavens, &c.* 356.
7. A bill of a creditor for the discovery of assets and their subjection to his demand, will not operate as a lien upon any right or interest which is not specified in the bill, and which might have been known by consulting the public records of the county. *McCauley, &c.* vs *Rodes and Macklin*, 463.

See *Attachment*, 10. *Attachment lien*, 1.

LIMITATIONS.

1. The statute of 1814, changed the savings in the statute of 1796, in behalf of *femes covert*, and reduced the time of protection, from ten to three years; and specified the class of cases to which the statute of 1814 should apply, i. e. to cases where lands had descended or been devised to *femes covert* during coverture: (5 *Dana*, 412; 1 *Marshall*, 377, *cited.*) *Riggs* vs *Dooley, &c.* 240.
2. Where a right descends or is devised which is *joint*, all must be under disability to receive the protection afforded by the statute of 1814. *Ibid*, 240.
3. The statute of limitation must be relied upon in the pleadings to authorize the Court to apply it. *Clark* vs *Smith*, 276.
4. Where there was a lending and borrowing of money, and a settlement had between the parties, a balance struck, and a separate note taken for usury, and paid in a few days—Held that the receiver could not rely upon limitation to bar its recovery, or its appropriation to the reduction of the principal, while any part of the principal remained unpaid: (*Crutcher* vs *Trabue*, 5 *Dana*, 80.) *Booker, &c.* vs *Gregory*, 440.
5. To avoid the effect of limitation, on the ground of a recent discovery of a mistake relied upon as the ground of recovery, the party must show an exercise of a proper degree of diligence in pursuit of his right. *Railroad Company* vs *Bridges*, 561.
6. The limitation of two years to the commencement of suits by assignees in bankruptcy, does not apply to applications to the Chancellor for rules to be made upon the parties to suits in chancery, for the restoration of money which had been improperly decreed to others and the decree reversed under which it was received. *Kane et al.* vs *Pilcher, &c.* 654.

LIMITATION OF ESTATES.

1. A conveyance of land "to Richard and his heirs and assigns, or in case of the death of said Richard without lawful heirs, then to Samuel and his heirs forever, to have and to hold the said tract or parcel of land unto the said Richard and his heirs, or in case of said Richard's death without lawful heirs, then to the said Samuel and his heirs, after the death of said Richard," reserving an estate for the life of the grantor—Held that the limitation over to Samuel was void, and that a fee simple passed to Richard. *Lee* vs *Lee et al.* 605.
2. A fee cannot be limited upon a fee, or after a fee by deed, according to the common law; but in modern times, it is allowed to be done by way of executory devise, or in a deed by way of springing or shifting executory use, dependent upon conditions that may happen within a reasonable time. *Ibid*, 606.
3. Where the whole estate is conveyed to, and vests in the first taker, any limitation over is void, as if land be limited "to one and his heirs, and if he dies without heirs, then to another," the last limitation is void: (*Fearne on Remainders*, 373.) *Ibid*, 606.

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LIMITATION OF ESTATES—*Continued.*

4. In wills, if the person to whom a limitation over, or after the first devisee should die, be himself capable of taking as heir to the first devisee, then the word "heirs" must be understood as meaning "heirs of the body," and the first devisee takes an estate tail, (*Fearne on Rem.* 467,) which by our statute is made a fee simple, (*Stat. Law*, 442,) and the limitation over is void. *Ibid*, 608.
5. A devise to a daughter and over in case she die leaving issue living at her death, provided they should die without issue, is too remote a limitation, and therefore void, it might not happen within a life in being and twenty one years. *Attorney General* vs *Wallace's devisees*, 616.
6. The testator devised estate to his daughter, with limitation over to others if she should die without leaving any child alive at her death—Held that the limitation was good as an executory devise. (*Fearne on Rem.* 399; 3. *B. Monroe*, 482, *and authorities there cited.*) *Ibid*, 616.

See *Railroad Company. Surety*, 8, 9, 10, 11. *Trusts*, 2, 3.

LIS PENDENS.

1. The filing of a bill in chancery with the Clerk, or even filing it in Court without suing out process, will not create a *lis pendens*, or stop the running of the statute of limitations. *Pindell, assignee* vs *Maydwell*, 314.
2. The date of the issue of process is the commencement of the suit: (7 *Monroe*, 111.) So is the service of notice in ejectment. Where the first writ in a suit at law is in time, but the second after the statute has barred, it is necessary to show the first writ returned. (6 *Term Rep.* 617.) *Ibid*, 316.

LUNATIC.

1. The heir or administrator of a committee of a lunatic, may be sued in any Circuit in which they may be found, by the representatives of the lunatic. *Hardin and wife* vs *Smith's ex'r.* 398.

MALICIOUS PROSECUTION.

1. Where a prosecution is malicious and unfounded, though instituted before a Court having no jurisdiction, an action on the case may be maintained. (1 *Chitty*, 153; *Morris* vs *Scott*, 21 *Wendell.*) *Hays* vs *Younglove*, 545.

MARITIME LAW.

See *Steamboats*, 1, 2, 3.

MARRIAGE.

1. Proof of cohabitation and a recognition by the parties of each other as man and wife, is, for most purposes, sufficient proof of marriage, subject to be rebutted. But in a suit by the relations of the supposed wife against the supposed husband for the property of the deceased supposed wife, where the issue is marriage in fact or not, marriage in fact must be proved by higher evidence. *Kuhl* vs *Knaner*, 132.

MARSHALLING OF ASSETS.

1. The Chancellor will do equal justice between creditors by a *pro rata* distribution of the assets over which he obtains power. *Cosby's heirs* vs *Wickliffe*, 120.

MASTER AND SLAVE.

See *Estoppal*, 1.

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MERGER.

1. The execution of a note for a demand due upon simple contract, merges the simple contract. A joint liability on simple contract may be extinguished by the note of one or more of the debtors, if the note be accepted in discharge of the joint liability; but if the note be not so accepted, the joint liability still remains. (*Donophan and Smoot* vs *Gill*, 1 *B. Monroe*, 199.) *Patterson, &c.* vs *Chalmers*, 597.

MILLS.

1. The overflowing of a spring by the erection of a dam, is a proper subject for consideration in determining upon the propriety of permitting the erection of a dam for a mill. (1 *Bibb*, 377; 3 *A. K. Marshall*, 328.) *McDougle* vs *Clark*, 449.
2. The existance of a mill, though it be not regularly established, near to a proposed mill, which will be destroyed or materially injured by the erection of the proposed mill dam, is a proper subject for the consideration of the Court in determining upon the propriety of erecting the proposed mill dam. *Ibid*, 451.
3. The statute declaring the reverter of land condemned for mill purposes upon a failure to rebuild, does not, in its terms, apply to cases where the owner of the mill is owner of the land on both sides of the stream. *Ibid*, 452.
4. The Court should exercise the power of permitting the erection of a new mill where one has been destroyed, with a reasonable regard to the public necessity, and the rights of the owner of the mill, and protect his rights and interest from injury, by the grant of a new privilege, without just compensation. *Ibid*, 454.

MISTAKES.

1. A fraud or palpable mistake, made by the field officers of a regiment, in a settlement with their paymaster, may be enquired into and corrected, on the trial of a motion against the paymaster for his supposed delinquency. Any evidence conducing to the proof of such mistake should be received. *Miller* vs *Fox*, 126.
2. The Chancellor has power to relieve against mistakes. The mistake of a Clerk in the date of recording a deed of conveyance, clearly appearing by record evidence, relieved against by the Chancellor, not by changing the record of the certificate as recorded by the Clerk, but by operating upon the party who seeks an advantage by the error of the Clerk. *Hiatt's heirs* vs *Calloway's heirs*, 179.

See *Limitations*, 5.

MORTGAGES.

1. Where a bill is filed to foreclose a mortgage upon real property incumbered by prior liens, it is proper to make all persons holding such liens parties. Or if prior suits are pending to enforee prior liens, to consolidate such suits, and avoid a sacrifice by multiplying sales of small parts. *Champlin* vs *Foster and Cunningham*, 104.
2. The mortgagor has an interest in the ascertainment of the amount of debt secured by mortgage, is a necessary party, and should have day of payment given him after the sum to be paid is ascertained. When a sale is ordered, the sum to be raised thereby should be stated; the sale reported, and any balance paid to the mortgagor, by the order of the Court. *Ibid*, 104.
3. A mortgage by a debtor to his sureties, is in effect a security for the debt: (4 *B. Monroe*, 142; *Ibid*, 531.) So a mortgage to secure several co-surettes is, in

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MORTGAGES—*Continued.*

the absence of special circumstances, to be applied as if still the property of the debtor: (7 *Dana*, 307; 6 *B. Monroe*, 206.) *Moore*, &c. vs *Mobberly*, 303.

4. If a mortgage be made to a surety who is an accommodation indorser, and the mortgagor be legally proved insolvent, or the surety become liable by the use of proper diligence on the part of the creditor, the creditor then has the right to be substituted to the rights of the mortagee, and ask a foreclosure for his benefit. *Tilford et al.* vs *James' adm'r.* 337.

5. In such case the mortgagee has no right to insist on a foreclosure until his liability is fixed. Before it is fixed, the mortgagee may release the mortgage. If the surety be released by the laches of the creditor, he cannot ask to be substituted to the rights of the mortgagee. *Ibid*, 338.

6. A mortgage to secure the mortgagee in his suretyships for the mortgagor, may apply to, and embrace suretyships existing as accommodation indorser, and its efficacy depend upon the contingency of the exercise of due diligence by the creditor in pursuing the principal. *Ibid*, 336.

7. Under the statute of 1838, (*Stat. Law*, 176,) the creditors of a mortgagor may, by bill in equity, compel a foreclosure and sale by martgagee, and have the benefit of any surplus after satisfying the claims secured by the mortgage, found to be really due. *Scrivenor*, &c. vs *Scrivenor*, &c. 375.

8. On decreeing the payment of money secured by mortgage, day should be given for its payment. Reasonable time should be given, which rests in the exercise of a sound discretion by the Chancellor. The usual time allowed, has been until some day in the succeeding term: (*Martin* vs *Wade's ex'rs.* 5 *Monroe*, 80,) which the Court think reasonable time. *Richardson* vs *Parrott's heirs*, 386.

MORTGAGOR AND MORTGAGEE.

1. A mortgagee who is in possession, and who is charged with rents, should be allowed for money expended in the payment of paramount liens. *Arnold* vs *Foot*, &c. 69.

MORTGAGED ESTATE.

See *Equity of redemption*, 1, 2, 3.

NEGLIGENCE.

1. An action on the case, lies for negligently navigating boats, whereby injury occurs to other craft. *Inman, Galt*, &c. vs *Funk*, 538.

2. It is the duty of those conducting boats on navigable streams, to use all reasonable care and diligence to avoid damage to other craft, whether they be weak or strong, and the weakness of the boat injured, if there is a want of proper diligence, will afford no apology for the injury. It should, if known, increase the care and diligence to avoid collision. *Ibid*, 536.

NECESSARIES.

See *Husband and wife*, 12, 13.

NEW TRIAL.

1. No new trial should be granted upon the ground that the verdict is against the weight of evidence, "unless the preponderance against the finding is palpable and flagrant." *Banfield* vs *Bruton*, 109.

2. To authorize a new trial on the ground that the verdict is against the weight of evidence, it should appear to be palpably so. *Bright* vs *Wilson's adm'r.* 123.

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NEW TRIAL—*Continued.*

3. An affidavit for a new trial, on the ground of discovery of testimony, should be accompanied by the affidavits of the witnesses or some very good reason given for their non production. *Bright* vs *Wilson's adm'r.* 124.
4. Though the verdict of the jury accord with the opinion of this Court upon the evidence, yet if the Circuit Judge improperly expounded the law to the jury, and then refused a new trial, this Court will reverse and order a new trial to be given. *James et al.* vs *Langdon*, 196.
5. Where the evidence upon the point involved in the issue before the jury is contradictory, it is the province of the jury to decide, and no new trial granted unless the jury have been mislead by the instructions of the Court. *Pleak* vs *Chambers*, 566.

NON-RESIDENT SUITORS.

1. Security for costs can only be required of non-resident plaintiffs, or in ejectment the lessors of the plaintiff, and the defendant alone is authorized to demand it. *Crawford's heirs* vs *Logan*, 182.
2. Can a surety for costs require the Court to interfere in his behalf between him and his principal and give security for his indemnity?—QUERE. *Ibid*, 182.

NOTICE.

1. Notice by covenantee to the covenantor, of a suit brought for the subject matter of the covenant of indemnity or warranty, by a third person, will make the decision evidence against the covenantor. *Beard's ex'r.* vs *Bayse*, 150.

See *Vendor and vendee*, 4. *Bills of exchange*, 1, 2, 3.

OBLIGATION OF CONTRACTS.

1. A statute which gives force and validity to a void contract, though it does not impair the obligation of *that* contract, yet by giving force and validity to a void contract, or that which was no contract before, but a mere attempt to make a contract, by which the fee is taken from one and given to another, effectually destroys, nay uproots and destroys the contract by which the property was held, and is therefore unconstitutional. *Pearce* vs *Patton's heirs*, 168.

OYER.

1. Oyer cannot be demanded of an original delivery bond given in a sister State, on which suit is brought in Kentucky, it being in the custody of the law. Oyer of a copy will suffice: (*Cites 5 Coke*, 74; 6 *Ibid*, 76 *a.*; 2 *Bibb*, 330; 2 *J. J. Marshall*, 270.) *Kelly* vs *Lank & Stephens*, 222.

PARTIES.

1. It is not necessary that those who may be in possession of land under heirs, should be parties to a suit between the heirs for partition. Nor does the champerty laws have application to suits for division between heirs, nor to conveyances where there was no adverse possession before suit brought. *Pleak* vs *Chambers*, 570.

See *Equity*, 1, 2.

PARTIES IN CHANCERY.

1. The assignor of a note is not a necessary party to a bill and attachment against the obligor to collect the note. *Clark* vs *Smith, &c.* 274.
2. In suits in chancery for contribution among sureties, all interested should be brought before the Court. *Moore, &c.* vs *Mobberly*, 305.

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PARTIES IN CHANCERY—*Continued.*

3. Upon a bill filed by an original trustee named in a deed for Church property, on behalf of himself and his associates, and others of the trustees claiming to be beneficiaries, the rights of the parties interested are properly before the Court for decision. *Gibson et al.* vs *Armstrong, &c.* 487.
4. The husband of the heir is a necessary party to a suit for the conveyance of land vested in the wife as heir to her father. *Mahan, &c.* vs *Mahan*, 581.

PARTIES IN SUITS AT LAW.

1. Where an action is brought for the tortious negligence or mismanagement or exercise of rights and duties belonging to a relation arising out of a contract, the non-joinder of part of the contracting parties will not affect the right of recovery. *Swigert, &c.* vs *Graham*, 660.

PARTITION.

1. In making partition of land, regard should not only be had to the quality of the soil and quantity, but also its value as affected by locality, convenience to public roads and other permanent advantages. *Hunter, &c.* vs *Brown*, 285.

PARTNERS AND PARTNERSHIP.

1. One partner cannot transfer partnership effects to his separate creditors to the prejudice of the creditors of the firm. *Black et al.* vs *Bush et al.* 211.
2. Each partner has a lien upon the partnership effects for the payment of the firm debts, and the firm creditors have a right to be substituted in equity, to the lien of the partner in the application of (and ratable distribution in case of deficiency,) of the firm effects. *Ibid*, 211.
3. If one represent himself to be a partner, and credit be given upon the faith of such representation, such an one will be responsible as a partner, whether he be actually so or not. *Markham's ex'r.* vs *Jones*. 457.
4. But representations to one person that he is a partner, will not make such person, (who is not a partner in fact,) responsible as a partner to one who has no knowledge of, and did not rely upon such representations. (*Smith's Mercantile Law, page* 23, *note p.*) *Ibid*, 457.
5. Part owners of a steamboat are not partners by such joint ownership, without a contract of partnership: (*Story on Partnerships*, 62,) they are but tenants in common, each having a joint but undivided interest: (*Abbott on Shipping*, 68.) One part owner may bind the others for repairs and supplies; the master can bind all to the same extent, but neither can procure insurances for the others. *Patterson, &c.* vs *Chalmers*, 599.
6. One partner who is a creditor of the firm, being himself liable for all the debts of the firm, cannot coerce payment of his demand until all the debts of the firm be paid, then he may be paid if there be assets of the firm sufficient, if not the loss must be apportioned amongst the members of the firm. *Simrall* vs *O'Bannons*, 610.
7. A note in the name of the firm to a member of the firm, is evidence of an item of indebtedness between the members of the firm, but is not enforcible at law according to its import; its availability in equity depends upon the condition of the firm; if assigned the assignee takes it subject to all the imperfections and drawbacks as the payee held it, *Ibid*, 610.

See *Surviving partners.*

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PATENTS.

1. A *sci. fa.* in the name of the King, was the ancient appropriate method for the repeal of patents which may have issued injuriously affecting the rights of others, and founded upon a false suggestion. In Kentucky the person injuriously affected by the issue of a patent, can use the name of the Commonwealth to have a repeal of a patent wrongfully issued. *Taylor* vs *Fletcher*, 84.

2. The general principle is, that patents cannot be impeached collaterally by extrinsic evidence *dehors* the patent: (4 *Bibb*, 336.)

There are exceptions to the general rule: 1st. When the Legislature has declared that the patent shall be void if issued in contravention of a described state of case; and 2d. Where they have declared that the patent shall be deemed fraudulent if issued under similar circumstances: (2 *Marshall*, 418; 6 *B. Monroe*, 433.) *Ibid*, 83.

3. Patents issued upon Kentucky Land Office Treasury Warrants, for land South of the Tennessee river, cannot be collaterally questioned, even when brought in competition with a patent on a Military entry and survey. But by the statute of 1820, (2 *Stat. Law*, 1343,) the latter patent may be impeached by showing the survey to be variant from the entry, and to the extent of such variance will be declared void even at law. *Ibid*, 83.

PLEAS AND PLEADING.

1. If the defendant plead as a set-off a demand due to him by the plaintiff and another, and issue be taken, it is too late to object to the plea, because the demand was joint; it should have been by demurrer to the plea. *Bright* vs *Wilson's adm'r.* 122.

2. The rule that a joint liability shall be asserted and enforced against all the contractors, is a technical rule of pleading that is to be considered as waived by a failure to present the objection at the first opportunity. *Ibid*, 123.

3. Is it a good plea to an action on a bond taken by a sworn officer in discharge of his official duty, to aver that it was delivered as an escrow in blank, or upon condition?—QUERE. *Ib.*

Such pleas are not good to an action of debt on a delivery bond, which when forfeited, constitutes a judgment of record. Such bond cannot be questioned collaterally by evidence *en pais*.: (*Cites* 3 *Littell*, 132; 2 *J. J. Marshall*, 400; 4 *Bibb*, 329.) *Kelly* vs *Lank and Stephens*, 223.

4. Is the plea of *non est factum* a valid plea to an action on a bond taken by a public officer, which when forfeited has the force and effect of a replevy bond?—QUERIE. *Ibid*, 225.

5. Promises by the defendant as executor, as well as by his testator, to pay for services rendered, for work and labor done for the testator, may be joined in the same declaration. But promises made by the executor for services performed to him as executor, for which he is individually liable, cannot be joined with promises by him for services performed to the testator. *Vaughn's ex'r.* vs *Gardner*, 327.

6. When a demurrer and pleas are filed together, and no disposition of the demurrer appears of record, this Court will presume it was overruled, and the defendant allowed, in this Court, to avail himself of any defect which he might when moving in arrest of judgment. *Ibid*, 327.

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POSSESSION.

1. If one tenant in common be in the undisturbed possession of land for twenty years, claiming the whole during such period, the jury may be directed to presume an *ouster*, unless the savings in favor of *femes covert*, &c, be available. (*Cowper*, 217.) *Riggs* vs *Dooley*, 240.

PRACTICE.

1. An order striking a case from the docket, on motion, should be regarded as a discontinuance thereof; but on a reservation of the right to reinstate the case, it should not be so construed. *Ashlock* vs *Commonwealth*, 45.
2. Where a copy of a will, duly proved and recorded, was produced before a jury sworn to try the validity thereof, without objection, it was error in the Court then to instruct the jury to find against the validity of the will, *unless the original was produced*. *James et al.* vs *Langdon*, 197.
3. The Judges in Kentucky have not the right to charge the jury upon the facts, as was the case in England. The practice has never obtained in Kentucky, In civil cases the Court decides the law and the jury the facts, uninfluenced by any judicial suggestion. *Howard et al.* vs *Coke et al.* 669.

PRACTICE IN THE COURT OF APPEALS.

1. This Court will not feel bound to affirm a judgment of a Circuit Court upon a point made and decided upon in the Circuit Court, though it concur with that Court, if upon other points not there made, it should be reversed. *Fry* vs *Breckinridge*, 33.
2. Though there be defects or imperfections in a declaration, yet if there be issues joined which necessarily require proof of the facts which should have been averred, and such issue or issues be found for the plaintiff, the defect will be cured by the verdict. *Vaughn's ex'r.* vs *Gardner*, 328.
3. When counts on promises by the testator are joined with promises by the executor, if it appear from the testimony adduced upon the trial, that the evidence was applicable exclusively to the promises by the testator, though part of the consideration was performed after his death, the verdict should stand, and the judgment be *de bonis testatoris*. But if the jury, from the evidence, might have found upon both counts, the verdict should not stand. *Ibid*, 328.
4. If the decision of the Circuit Court be right, though for a wrong reason, this Court will not reverse. *Wickliffe* vs *Bascom*, &c. 683.

PRACTICE IN CHANCERY.

1. Is a decree of the Circuit Court, entered upon the minute book of the Clerk, such a decree as will authorize the issual of execution thereon?—QUERIE. *Campbell* vs *Weakly*, 22.
2. Whether it be or not, cannot be decided by this Court until some adjudication upon the question by the Circuit Court, upon writ of error *coram vobis*, or motion to quash the process. *Ibid*, 22.
3. That a decree was rendered on the last day of the term, and after a general order of continuance had been made, is no ground of reversal; if there was then no objection made, the Court of Appeals will presume that the papers were the hands of the Court before the general order of continuance, and that the order did not apply to the case. *Ibid*, 23.
4. Either party has the right to file the mandate of the Court of Appeals in the inferior Court, and the other party is bound to take notice of such filing, and subsequent proceeding in the case. *Ibid*, 24.

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PRACTICE IN CHANCERY—*Continued.*

5. The reports of auditors or commissioners acting under the orders of the Chancellor, should not be made the basis of the action of the Court, when, though not excepted to, errors exist therein. *Campbell* vs *Weakly*, 24
6. A party examined before an Auditor or Master in chancery, has the right to have the questions propounded in writing. *Winter* vs *Wheeler*, 29.
7. The answers of a party who is examined by a Master in chancery, are in the nature of answers to interrogatories in a bill in chancery, and are evidence to the like extent against the party making them and no farther. *Ibid*, 30.
8. On the filing of a petition by one who conceives himself interested in the decision of a chancery cause, to be made a party, the correct practice is to move the Court to consider the petition, and that the petitioner be made a party; otherwise it is not the duty of the Court to take up and consider the petition until the trial of the cause. But if such petition be filed of record, the petitioner should not lose the benefit thereof, by failing to require the action of the Court thereon before the hearing. *Williams* vs *Hall*, *&c.* 296.
9. One who files his petition of record to be made a party to a pending chancery cause, but which the Court disregarded, may prosecute a writ of error to the decision of the Court, though no bill of exceptions was filed to the opinion of the Court disregarding it. *Ibid*, 296.
10. One who shows himself interested in the decision of a pending chancery cause, should be made a party on his petition filed for that purpose; the failure of the Circuit Court to so direct, is good ground for reversal in this Court, at the instance of such petitioner. *Ibid*, 297.
11. The Court will not decree the payment of rents when not prayed for by the complainant, nor will it decree rents against the widow for land occupied by the husband during the coverture, though under her right. *Coleman* vs *Dallam*, *&c.* 325.
12. A reference in pleadings in chancery, to the report of a settlement of an administrator's account, necessarily implies a reference to the vouchers accompanying the report. *Mattingly's heirs* vs *Corbit*, 377.
13. Where a party at the time of rendering an interlocutory decree foreclosing a mortgage, consented that interest should be annually compounded, it was not error to refuse the defendant leave to repudiate his agreement at the rendering of the final decree. *Booker*, *&c.* vs *Gregory*, 442.
14. It is not error to try a chancery suit at the same term at which the answer is filed, if there be no objection. *Richardson*, *&c.* vs *Linney*, 575.
15. Parties to suits which are consolidated and tried together, are presumed to know what is in litigation in all the cases, and are bound by the joint decree rendered therein. *Tharp*, *&c.* vs *Cotton's ex'r*, 642.

See *Consolidation of suits.*

PRACTICE IN SUITS AT LAW.

1. An order striking a case from the docket on motion, is to be regarded as a discontinuance thereof; but if the right is reserved to reinstate the case thereafter, it should not be considered as a discontinuance. *Ashlock* vs *Commonwealth*, 45.
2. It is a doubt whether after a suit is brought against an administrator, and he is then removed, and the suit revived against the administrator *de bonis non*, the suit can be still continued against the removed administrator. If it can be so prosecuted, there should be some evidence placed upon record of such intention. *Anderson's adm'r.* vs *Irvine*, 209.

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PRACTICE IN SUITS AT LAW—*Continued.*

3. A party who has procured the rejection of a deposition filed by his adversary, should not be permitted afterwards to read it without the consent of the other party. *Thomas* vs *Davis*, 228.
4. On motion to instruct the jury to find as in case of non suit, the Circuit Judge overruled the motion, remarking that "the evidence entitled the plaintiff to a verdict."—Held no ground of reversal, though if the Judge had so informed the jury by way of instruction, it should have been hypotheticated upon their belief of the evidence. *Snowden* vs *McKinney*, 260.
5. Testimony admitted without objection in the Circuit Court, can not be objected to in the Court of Appeals, though it might have been rejected in the Circuit Court. *Jarboe* vs *McAtee's heirs, &c.* 279.
6. Where proof of one fact in a trial before a jury is necessary to the admission of another fact, and there is proof *conducing* to prove such preliminary fact, the Court should not, generally, exclude such evidence from the jury, but leave its weight to the jury. *Swearingen, &c.* vs *Leach*, 287.
7. If the fact on which the relevancy of the disputed fact depends, be merely preliminary and not otherwise essential than as it may lay the foundation for receiving the evidence in question, then it may be, perhaps in all cases, proper to make the admissibility of the disputed evidence depend upon the opinion of the Judge as to the sufficiency of the proof to establish the preliminary fact. But if the preliminary fact be otherwise material in the case, and essentially involved in the issue, it is generally otherwise. *Ibid*, 288.

See *Instructions*, 1, 2, 3, 4, 5. *Bonds for costs*, 1, 2.

PRESUMPTIONS.

1. The presumption is great that after a lapse of twenty years from the time of administration, that the debts of the decedent have been all paid, and no refunding bond should be then demanded. *Clemens* vs *Caldwell*, 177.
2. In ejectment the demise was laid on the ——— day of ——— 1844, the title exhibited commenced on the 2d March, 1844, which was before the suit was brought, verdict for plaintiff. The presumption should be in favor of the existance of title in the lessor, before the demise to sustain rather than defeat the verdict. *Snowdon* vs *McKinney*, 260.
3. Where land has been held under a claim of grant from the Commonwealth for 50 years, a grant will be presumed. (3 *Starkie* 1221; *Greenleaf's Ev.* 50.) *Jarboe* vs *McAtee's heirs, &c.* 279.
4. In New York where there was an order of survey by the council, and a survey actually made, a grant was presumed after 40 years. (10 *Johnson*, 377.). *Ibid*, 280.
5. A power of attorney to make a deed presumed after a lapse of fifty years, where the possession was held during all that time under the deed. *Ibid*, 281.
6. This Court will not, in the absence of proof, presume that a *feme covert* who has conveyed thirty years ago, is still living. *Ibid*, 282.
7. After a great lapse of time, settlements made and reported to Court by fiduciaries, which have received the sanction of a judicial tribunal, will be deemed *prima facie*, correct. *Hardin and wife* vs *Smith's ex'rs.* 395.

PRINCIPAL AND SURETY.

1. The confessions of a principal officer, made long after his term of office has expired, are not evidence against his sureties in a suit upon his official bond: (*Greenleaf on Evidence*, 219.) *Commonwealth, for Russell* vs *Brassfield*, 447.

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PRINCIPAL AND SURETY—*Continued.*

2. A surety in a replevy bond who has paid the debt, may maintain assumpsit against all against whom the original judgment was recovered. They all stand as principals to him, whether they were sureties or principals in the original debt. *Whitman, &c.* vs *Gaddie*, 591.

PURCHASER.

1. A *bona fide* purchaser of property which may have been fraudulently purchased from the vendor with the intent never to pay for it, will be protected in his purchase. *Gibson* vs *Moore*, 84.
2. The general principles of equity require that a vendor of property from whom purchases may have been made with the fraudulent design not to pay, should show that he has pursued his remedy for the recovery of the property with reasonable vigilance after the discovery of the fraud. *Ibid*, 84.
3. Though the goods be purchased with the fraudulent design of not paying for them, yet if before vendor sues for their recovery, they are conveyed in trust for the payment of previously subsisting debts of the purchaser, without knowledge of the fraud in their obtention on the part of the vendee, the vendor's right to restitution will be lost. *Ibid*, 85.

PURCHASER, *LIS PENDENS.*

1. A *lis pendens* purchaser of land, buys subject to the decision of the suit. By his purchase he is entitled to free the estate from liens or incumbrances, and make good his title. *Hopkins* vs *Garrard*, 312.

RAILROAD COMPANY.

1. The Directors of the Lexington and Ohio Railroad Co., could not be made responsible to the creditors of the Company beyond the amount improperly disbursed to the stockholders as dividends, and if made responsible to creditors would have a right to have it refunded. *Railroad Company* vs *Bridges*, 562.
2. It is not proper to decree against an individual member of the Company whose stock had been forfeited to the Company, to satisfy a judgment against the Company, *Ibid*, 564.

RECEIPTS.

1. A receipt obtained for an illegal and vicious consideration, will present no bar to a recovery upon a note or bond based upon a valid consideration. *Best* vs *Higginbotham*, 125.

RECITALS IN TITLE DEEDS.

See *Vendor and Vendee*, 4.

RELATOR.

1. In proceeding in the name of the Attorney General, to compel the execution of a charity, the name of some responsible person should be used as relator, who will be responsible for costs, and who should have the control of the suit, its preparation and management, independently of the power of the Attorney General. *Attorney General* vs *Wallace's devisees*, 619.

REMAINDER.

1. A vested remainder in slaves of the wife, not reduced to possession by the husband during the coverture, survives to the wife, and not to the representatives of the husband. *Ring, &c.* vs *Baldridge*, 536.

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RENTS.

1. Rent secured by note to the mortgagor, and assigned before a sale of the mortgagor's equity of redemption in mortgaged estate, does not pass to the purchaser of the equity of redemption. *Abel* vs *Wilder & Co.* 533.

See *Distress warrant*, 1, 2. *Practice in Chancery*, 11.

RETAILING SPIRITS.

1. A warrant issued by the Clerk of the City Court of Lexington, "for presuming to sell by retail without license so to do, any quantity of wine, brandy, whiskey," &c., is too indefinite a charge to authorize a judgment by the City Court under the City Ordinance making it penal "to sell by retail less than a quart. *Bridgeford* vs *City of Lexington*, 48.

SCIRE FACIAS.

See *Patents*, 1, 4.

SET-OFF.

1. If a defendant plead to a demand due by himself, a demand due by the plaintiff and another, and issue be joined upon the plea, it is then too late to object that the demand being joint, cannot be set-off. The objection should have been by demurrer to the plea. *Bright* vs *Wilson's adm'r.* 122.

SETTLEMENTS.

1. A father-in-law gave a bond to his son-in-law for the conveyance of a tract of land, estimated to be worth $1,492 50—$1,000 of which was a donation by the father-in-law to the wife of the obligee, and the remainder, $492 50, to be paid by the obligee. The $1,000 was receipted for as a donation to the wife of the obligee—the father-in-law died before a conveyance, and the title to the land descended to the heirs of the obligor, of whom the wife of the obligee was one. The wife of the obligee against the creditors of her husband, the obligee, insisted upon her right to a settlement to the extent of the $1,000, that part of the price of the land donated to her by her father, as the father had treated that donation as an advancement to her, and on that account given her less than his other children, such appearing to be the fact.—Held that to the extent of $1,000 in the land, she had in equity a right to a settlement. *Pierce* vs *Pierce*, 434.
2. Would not a father-in-law giving his bond to convey as a donation, a tract of land to his son-in-law, have the right to require a settlement of it upon his daughter, and resist a specific execution until such settlement was made, especially if the husband became insolvent? *Ibid*, 435.

See *Husband and wife, passim. Femes Covert*, 5.

SHERIFFS.

1. Upon the dissolution of an injunction, execution issued for the principal debt and was placed in the hands of the Sheriff, to whom property was surrendered by the defendant in the execution to sell to pay the execution; the Sheriff left the property in the hands of the defendant; the property was run out of the State and the defendant proved to be insolvent; the surety in the injunction bond was sued and paid the debt—Held that the Sheriff, in an action on the case, was liable to the surety in the injunction bond, who by the misconduct of the Sheriff in not taking care of the property, had been rendered liable. *Rowe* vs *Williams*, 206.

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SHERIFFS—*Continued.*

2. The right to maintain an action against a Sheriff for misconduct in the management of an execution, is not always confined to the parties to the execution, but exists in behalf of any whose legal rights are affected by the illegal act of the Sheriff. (3 *Dana*, 397; 22 *Wend.* 556.) *Ibid*, 208.
3. It is the duty of the Sheriff to make a sufficient levy to satisfy the execution placed in his hands, but not an excessive levy; he should be governed by a sound discretion. If he fails to make a sufficient levy, damages for the failure should be assessed proportionate to the injury, not to the amount of the execution, unless the injury has been to that extent. *Commonwealth, for Anderson* vs *Lightfoot, &c.* 299.
4. It is the duty of a Sheriff or other officer levying an execution upon land, to designate the nature of the right upon which he levies and offers for sale. (3 *Dana*, 199.) *Wickliffe* vs *Bascom*, 688.

See *Substitution*, 2.

SHERIFF'S SALE OF LAND.

1. To make out title under Sheriff's sale and deed for land, it is necessary to show the judgment and execution under which the sale and deed were made. *Riggs* vs *Dooley, &c.* 239.

SLANDER.

1. "Wilson held Foster's horse whilst Foster knocked the defendant off his horse, put his hands in his pocket and said, *the damned old rascal had no money and he would take his tobacco for his trouble, the one held while the other skinned*"—Held not actionable words; not importing the commission of a felony. *Russell* vs *Wilson*, 261.
2. To charge one with having "sworn a lie in the Pike Circuit Court in the trial of the case of the Commonwealth against D.," is actionable. *Ramey* vs *Thornberry*, 475.

SLAVES.

1. The Chancellor has jurisdiction to decree the emancipation of slaves who have the privilege of electing to be free and go to Liberia, upon their so electing. *Graham's ex'rs.* vs *Sam et al.* 405.
2. A slave by being taken into a non-slaveholding State by his owner or by his owner's permission for a transient purpose only, does not thereby become free. *Strader, &c.* vs *Graham*, 635.

SLAVES, IMPORTING OF.

See *Indictment*, 1, 2.

STATUTES CITED OR CONSTRUED.

1833, Against the importation of slaves, page 1.
1809, Establishing examining Courts, page 12.
1812, Concerning foreign executors and administrators, page 17.
1797, In relation to executors and administrators, pages 21, 110, 156.
1800, To amend the laws of proceedings in civil cases, page 23.
1748, Concerning rents, page 31.
1796, Concerning the establishment of towns, page 38.
20th section of the 10th article of the Constitution of Kentucky, page 49.
1796-7 and 1802, Concerning the Penitentiary and criminal proceedings, page 50.
1831 and 1840, In relation to tipling houses, page 78.

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STATUTES CITED AND CONSTRUED—*Continued.*

1799, 1820, 1821 and 1825, Concerning patents, page 78.
1811, Concerning division of lands, page 90.
1838, Concerning fraudulent conveyances and attachments, pages 83, 345, 375.
1797, To reduce into one the law of wills, page 112.
Civil code of Louisiana in regard to the property of *femes covert*, page 127.
1819 and 1831, In regard to revenue, page 160.
1831, Concerning conveyances, pages 163, 178.
1839, Regulating the settlement of estates, page 210.
1st sec. of the 4th art. of the Constitution of the United States, page 224.
1790, Of Congress concerning authentications, page 225.
1809, Of Kentucky making published laws of other States evidence, page 230.
1803, In relation to dower, page 233.
1798, Concerning slaves, pages 235, 536, 583.
1796 and 1814, Concerning limitations, page 240.
1802, To amend the penal laws, page 261.
1797 and 1830, Respecting distribution, page 290.
1796 and 1799, Statutes of jeofails and amendment, page 328.
1803 and 1830, In relation to writs of error *coram vobis*, page 332.
1793, 1797 and 1810, Concerning County Courts and County levies, 340.
1842, Regulating Justices Courts, page 350.
1796, Statute of frauds, pages 357, 73,
1829 and 1838, Limiting actions against sureties, pages 377, 468.
1814 and 1835, Respecting religious societies, pages 484, 486.
1828, Execution law, page 532,
1800, Respecting wills, page 536.
1796, Concerning conveyances, pages 608, 696.
1601, In respect to charitable uses, page 617.
1824, Concerning champerty and maintenance, page 650.

STEAM BOATS.

1. The liability of steam boats for injuries to each other by collision in the navigation of the Ohio, is governed by the common law, and not by the admiralty law, as is the case with vessels at sea. *Broadwell* vs *Swigert et al.* 41.
2. It is not in the power of the Judiciary of Kentucky to adopt the civil law or the marine code of Europe in determining the liability of steam boat owners for injuries arising from collisions on the western waters. And though the jurisdiction of such cases is given to the Chancellor, and the power to attach the boat, the common law principles must govern his adjudications. *Ibid*, 43.
3. Injuries done to steam boats on the Ohio, are to be determined by the rules of Courts of common law, not the admiralty Courts. By the common law, if the officers of two boats coming in collision were both in fault, neither can recover. So if the collision was the result of accident. *Ibid*, 41.
4. Though the Chancellor has, by the laws of Kentucky, jurisdiction to attach steam boats for alledged injuries arising from collisions, yet the rights and claims of parties are to be decided by the rules of the common law. *Ibid*, 43.
5. A beneficial interest in a steam boat, renders the person holding it liable for services done or supplies furnished for the boat, though such person be not the legal owner: (*Kent's Com.* 123; 16 *East's Rep.* 174; *Collyer on Part.* 684.) *Strader* vs *Lambeth*, &c. 590.

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SUBSTITUTION.

1. One who was insolvent became the creditor of another insolvent, by taking up the notes of the latter, to which there were sureties; and giving his own notes with surety, in the settlement of the estate of the debtor under the statute of 1839. The sureties to the new notes should be allowed to be substituted to the place of their principal, and share in a *pro rata* distribution of the estate. *Black et al.* vs *Bush et al.* 212.
2. A Sheriff who has become liable to a plaintiff in execution, and pays it off, has the right to be substituted to the rights of the plaintiff in the execution, and may use the execution in the name of the plaintiff, to be reimbursed the amount so paid. *Bray* vs *Howard, &c.* 467.

SURETIES.

1. The sureties of an administrator required of the administrator counter security; to a summon from the County Court, he appeared and answered that he was *unable* and *unwilling* to give counter security. The County Court made an order that he be removed, upon condition that the sureties making the motion, or either of them, take the administration of the estate according to law—Held that there was no error in such order of the County Court prejudicial to the sureties, for which they could ask its reversal. *Roope* vs *Rodes' adm'r.* 110.
2. Can a surety in a bond for costs, ask the Court to compel the plaintiff to give counter security or indemnify the surety—QUERE. It must be an extraordinary case to justify it. *Crawford's heirs* vs *Logan*, 182. *Same* vs *Kenley*, 254.
3. An agreement for forbearance between the creditor and principal debtor, though without the assent of the surety, does not exonerate the surety, unless it be a binding agreement upon sufficient consideration and enforcible by law. (1 *B. Monroe*, 322, 325.) *Anderson* vs *Mannan, &c.* 218.
4. An agreement by a creditor with the principal debtor, to indulge the principal in consideration of the note of the principal for part of the accruing interest, beyond the legal interest which was accruing upon the note, and a credit given on account, to the principal for the remainder of the illegal interest, without any receipt for, or release of, the amount, was not such a binding agreement as released the surety, though made without his assent. *Ibid*, 219.
5. The contract being a unit and voidable in part, by the debtor was not so far binding as to release the surety. *Ibid*, 220.
6. A debtor mortgaged his property to a creditor, who was surety for the mortgagor, separately in some cases and jointly with others in other cases, conditioned to be void on the payment of the debts due to the mortgagee, and satisfying all the debts in which he was surety, and keeping him free of expense. The mortgagor also assigned to the mortgagee and another surety, other securities, for money assumed to be for the same object—Held that the securities should be appropriated to the *pro rata* payment of all the debts, as well that due to mortgagee as those for which he was surety. *Moore, &c.* vs *Mobberly*, 301.
7. In such case if no part of the debts had been paid and all the creditors before the Court, a *pro rata* distribution would have been proper, in case of a deficit, and if the debts were partially paid by the sureties, or either of them, they should have been substituted to the place of the creditors, the mortgagee will thus receive only his *pro rata* distribution of his own debt with other creditors. *Ibid*, 302.
8. A surety, according to the statute of 1838, (3 *Stat. Law*, 559,) is not released until the lapse of seven years after the cause of action accrued, or five years upon contracts executed after the passage of the act, though seven years may have

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SURETIES—*Continued.*

elapsed from the time the action accrued before the expiration of five years from the passage of the act. (5 *B. Monroe*, 564.) *Mattingly's heirs* vs *Corbit*, 377.

9. A surety in a replevy bond is released by the failure of the plaintiff to sue out execution thereon for one year. (2 *B. Monroe*, 378.) *Bray* vs *Howard*, *&c.* 468.
10. Sureties are discharged from liability on *judgments*, injunction bonds, &c., when seven years shall have elapsed without execution, &c. The term sureties in judgments is understood to apply to sureties in bond or bonds on which judgments have been recovered. *Ibid*, 468.
11. When seven years elapsed after judgment before execution, or when seven years elapsed between the issual of executions, the surety is released. *Ibid*, 469.

See *Executors and administrators*, 1, 2, 4. *Substitution*, 1.

SURVIVING PARTNERS.

1. The declaration being in the name of one as surviving partner, necessarily implies the death of the other partner. *Patterson*, *&c.* vs *Chalmers*, 595.

SURVIVORSHIP.

1. When a devise is made to two or more as tenants in common, and one dies or there be a revocation as to one, the share of such an one will not survive to the others. *Attorney General* vs *Wallace's devisees*, 622.

TAXATION.

1. The right of taxation is a sovereign right, and is not to be considered as waived as to the property of corporations, unless by express provision, though the shareholders may reside out of the State where the corporate property is situated. *Louisville and Portland Canal Co.* vs *Commonwealth*, 161.
2. The imposition of a State tax upon the property of a corporation, is no violation of the contract or privilege given by the charter, unless the right to levy the tax be expressly surrendered by the charter. *Ibid*, 161.
3. In ascertaining the tax to be imposed upon the property of the Louisville and Portland Canal Company, under the statute of 1819, (2 *Stat. Law*, 1376,) the Canal and all Locks, Dams, Bridges and Houses, should be included in estimating the amount. *Ibid*, 160.

TENDER.

1. In a plea of tender at law, it is necessary to bring the money into Court. So in chancery, it is necessary, to stop interest, that the money be brought into Court when the tender is pleaded. *Jarboe* vs *McAtee's heirs*, *&c.* 282.

TITLE TO LAND.

1. To show title to land under a Sheriff's deed, it is necessary to show the judgment and execution under which the sale was made. *Riggs* vs *Dooley*, *&c.* 239.

TORTS.

1. As the laws of Kentucky now stand, there is no power to compel an appearance by attachment or proclamation, of a non-resident to answer for a tort committed in this State. *Meres* vs *Chrisman*, *&c.* 423.

TOWNS.

1. The trustees of towns have no authority to convey the streets and alleys and public grounds, and such conveyances pass no title. (1 *Marshall*, 9; 8 *Dana*, 50; 3 *B. Monroe*, 437.) *Giltner* vs *Trustees of Carrollton*, 681.

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TOWNS—*Continued.*

2. After a town has been regularly established, the original proprietors has no such interest in the lots as is the subject of levy and sale under execution, without his consent—the legal title becomes vested in the trustees. *Wickliffe* vs *Bascom, &c.* 685.

TRUSTS.

1. A subscription was raised to build a Church in Harrodsburg, and the fund committed to certain trustees to purchase ground and build a house to be used by the Methodist Episcopal Church half the Sabbaths in each month, the remaining Sabbaths by other denominations. The same trustees were directed to sell the house after the title was acquired, to another denomination, and vest the fund in a Church to be used by the Methodist Episcopal Church exclusively, which was done—Held that the trustees had well performed their trust, and that the subscribers could not complain, and a specific performance decreed. *Alexander, &c.* vs *Slavens, &c.* 354.
2. In cases where there is a direct, express and continuing trust, of a purely equitable character, the Chancellor does not apply the statute of limitation. But where the trust is not strictly of that character, and where the party seeking redress has a legal remedy, and a Court of law concurrent jurisdiction, the rule does not apply; the Chancellor, in the latter case, will apply the statute as it would be applied in a Court of law. *Railroad Company* vs *Bridges,* 559.
3. The trust confided to the Directors of the Lexington and Ohio Railroad Company, who were to remain in office only one year, was not a continuing trust, but terminated with the term of office, and though they were re-eligible and actually re-appointed, the latter appointment was also temporary, and therefore not such a continuing trust as to withdraw it from the operation of the statute of limitation. *Ibid,* 560.
4. Property was conveyed in trust by an unrecorded deed, the trustee becoming involved, conveyed to the *cestui que trusts,* before any lien was acquired by the creditors of the trustee—Held that the latter conveyance was valid, and that the creditors of the trustee could not reach it by bill in equity. But if the fraudulent vendee had retained the possession of the property, it would have been liable for his debts. *Clark's adm'r.* vs *Rucker,* 584.
5. Where trustees have power to relinquish to *cestui que trust,* the entire title to property held in trust, at their discretion, they will not be presumed to have done so from the fact that they permitted *cestui que trust* to sell a part, (a slave,) and hold the possession and pay taxes on the remainder. *Flournoy* vs *Johnson and Tingley,* 694.

TRUST ESTATE.

1. The interest of one of several *cestui que trusts* may properly be decreed to be sold by the Chancellor to pay the debts of the *cestui que trust.* It is subject, by the statute of 1796, (1 *St. Law,* 443,) to sale under execution when held separately. *Flournoy* vs *Johnson & Tingley,* 694.

TRUSTS, RESULTING.

1. If a convayance of land be made to A., and B. prove that he paid a part of the price for his own use with the intent to secure an interest in the land, a trust results in favor of B. though he be not named in the deed. If the deed recite the payment by B., then A. would hold in trust for B. *Pierce* vs *Pierce,* 436.

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TRUSTS AND TRUSTEES.

1. When a devise is made of land to trustees to pay debts, &c. who refuse to accept the trust, the title devolves upon the heirs of the devisor, subject to the debts, &c. (3 *Dana*, 185,) and where land is devised in trust to be sold to pay debts, and the trustee refuses to execute the trust, the administrator with the will annexed, may sell under the authority of the act of 1810, (1 *Stat. Law*, 671.) *Owens, &c.* vs *Cowan's heirs, &c.* 157.
2. An administrator with the will annexed, becomes a trustee in the place of an executor refusing to qualify, and is responsible as a trustee, and amenable to the Chancellor, who may remove him as trustee of a devise, for cause, and appoint another. *Clemens* vs *Caldwell*, 174.
3. The failure of a trustee to invest a fund as directed, and the use thereof in his own business, is good ground for his removal by the Chancellor. *Ibid*, 174.
4. The effect of the removal by the Chancellor of one trustee, and the appointment of another, is not to change the object of the trust, but for its security to the *cestui que trust*. It is still within the power of the Chancellor. *Ibid*, 174.
5. The removal of one trustee, and the appointment of another, on a bill filed for that purpose, is not necessarily a final disposition of the case; the Chancellor may retain the case, and compel an account with the newly appointed trustee. *Ibid*, 175.
6. A trustee who has failed to invest a fund and its interest in stocks as directed, but employed it in his own business, is responsible for interest on the annually accruing interest, if an investment was practicable, if not, then for such interest as the fund would have produced in the hands of a man of ordinary prudence. *Ibid*, 175.
7. One of several trustees to whom debts have been assigned, may give authority to one of a firm of unsatisfied and prefered creditors, to sue for the recovery of an assigned debt for their benefit, without the assent of the other trustee. *Kelly* vs *Lank & Stephens*, 221.

See *Charities*, 2, 3.

TRUSTEES OF CHURCHES.

1. Trustees of Churches under the authority of the statute of 1835, (3 *Stat. Law*, 499,) may maintain suits to enforce any claim of the Church, or for damage done to the Church. They cease to be trustees when they cease to be members of the local Church. *Gibson et al.* vs *Armstrong, &c.* 486.

TRUSTEES OF TOWNS.

1. Trustees of towns in Kentucky are authorized to have the streets kept in repair by the citizens thereof, and for failing to require and have them kept in order by the citizens, the trustees are liable to indictment by the common law, and to punishment by fine and imprisonment, and this Court, since 1841, has no jurisdiction to revise a judgment in such cases, except at the instance of the defendant. *Commonwealth* vs *Trustees of Hopkinsville*, 38.

USURY.

1. Usury cannot be recovered by a creditor of the payor, without a transfer of the right of the payor to such creditor; (1 *B. Monroe*, 314.) A note given in New York for usurious loan, and paid off in Kentucky, gives no right to a creditor of the payor to sue in equity for the money paid, nor to recover the usury, without the assent of the payor, though the note may have been void in New York. *Graham, &c.* vs *Moore, &c.* 54.

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USURY—*Continued.*

2. A debtor whose note has been assigned which includes usury, when sued in chancery, may bring in, by cross bill, the assignor, and recover any usury paid, not barred by lapse of time. *Clark* vs *Smith*, 276.
3. A surety who has paid usury for his principal, may sue for and recover it from the payee, unless he has been reimbursed by his principal. The principal has no right to reclamation until he has paid the surety the usury paid by him for the principal. *Kirkpatrick* vs *Wherritt, assignee, &c.* 388.
4. All payments made of usurious interest, may, at the option of the payor, be regarded as so much paid upon the principal and legal interest at the time when paid, until the principal and legal interest is fully paid off: (*Gray* vs *Gray's ex'r.* 5 *B. Monroe*, 92.) *Booker, &c.* vs *Gregory*, 442.
5. The Banks are authorized by their charters, to deal in bills of exchange, and the law does not fix the rate of exchange, or limit the discount on bills purchased by them. But a loan of money, however, under pretext of buying a bill of exchange, in which more than legal interest was charged, would be usurious. *Pilcher, assignee* vs *The Banks, &c.* 549.
6. Whether a contract to receive more than legal interest be upon the loan of money or for the forbearance of a debt due, it is usurious: (5 *Littell*, 85.) *Craig* vs *Hewitt*, 476.
7. If the facts be set forth which constitute a usurious transaction, the Court will draw the legal conclusion: (6 *Monroe* 81; 7 *Ibid*, 263; 1 *J. J. Marshall*, 11.) *Ibid*, 476.
8. It is not usury for a debtor to purchase the notes of his creditor at less than their nominal amount, and have a set-off to their full amount. *Young* vs *Miller*, 541.
9. So the debtor may pay off his own note before due with less than its nominal amount, and it will not be usurious, unless done with the intent to evade the usury laws. *Ibid*, 542.
10. —But if the purchaser of a note charge the payee, after the note purchased becomes due, a greater rate of interest than 6 per cent., and it be paid, whether in money, his own notes, the note of a stranger of like amount then due, the transaction is usurious, as exacting more than legal interest for forbearance. *Ibid*, 512.
11. So a creditor receiving his own note due in future, at a discount of more than legal interest in payment of a debt then due from the payor, is usurious. *Ibid*, 514.
12. Banks may buy bills of exchange at a greater or less discount, proportioned to the time they have to run and the risk to be incurred by the fluctuation of the money market, without being guilty of usurious exactions. *Pilcher, assignee* vs *The Banks, &c.* 549.

See *Limitation.*

VARIANCE.

1. A variance in the proof from the day alledged in the declaration for the performance of a contract to deliver property, held to be material. *Bannister* vs *Weatherford*, 271.

VENDOR AND VENDEE.

1. A vendee who has been let into possession, received a conveyance, and is in the undisturbed enjoyment of his purchase, will not be entitled to a rescission on account of dormant claims which he may stimulate others to assert against the title purchased. *Brassfield* vs *Walker, &c.* 97.

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VENDOR AND VENDEE—*Continued.*

2. Title of vendor presumed to be valid from proof of a possession for forty years, accompanied by other circumstances. *Ibid*, 97.
3. Where there had been a division of land amongst heirs by County Court commissioners, though not strictly formal, long acquiesced in by them, and a vendee had purchased from those claiming under that division, received the possession, and a deed with warranty, and continued in the undisturbed enjoyment of his purchase, the Chancellor refused to rescind the contract. *Ibid*, 100.
4. A recital in a deed to a vendor, that it was made for a consideration "paid and secured to be paid," is constructive notice to the vendee that a part of the consideration was unpaid at the date of the deed, and sufficient to put the vendee upon the look out to ascertain if it was still unpaid, and if it was in fact unpaid, a lien would still exist upon the land for its payment. (6 *B. Monroe*, 67; *Ibid*, 74.) *Woodward* vs *Woodward*, *&c.* 117.
5. When a vendee files his bill against his vendor, alledging defect of title in the vendor, to land purchased, and the title be perfected after the filing of the bill, or obtained by cross bills in the same suit, no damages should be decreed upon judgment for the money enjoined by vendee. *Owens*, *&c.* vs *Cowan's heirs*, *&c.* 158. *Lampton* vs *Usher's heirs*, 66.
6. In estimating the length of the possession of a vendee in contest with vendor, the calculation should embrace the time up to the trial of the suit, and if the vendor's title is then made perfect, vendee should accept it. *Jarboe* vs *McAtee's heirs*, *&c.* 282.

VENUE.

1. When the venue has been changed to a county where one of the parties reside, the Court may remand, but cannot change it to any other county than that from which it was removed. *Attorney General* vs *Wallace's devisees*, 613.

WAIVER OF EQUITY.

1. If one execute his note to a third person, or induce him to buy his note, it is a waiver of any equity against the payment thereof. *Simrall* vs *O'Bannon*, 609.

WARRANTY.

1. To constitute a covenant of warranty, it is not necessary that the word *warrant* should be used. Any word or words of equivalent import, showing an intention to warrant, will be sufficient. *Banfield* vs *Bruton*, 109.
2. "I have this day sold to T. B. my negro boy J., aged 22 years, which I warrant to be a slave for life," &c., is not a warranty as to the age of the boy J., but only a description or representation. *Ibid*, 109.

WILLS.

1. A widow renouncing the provisions of her husband's will, is entitled, under the 24th sec. of the statute of 1797, to one *third* only of the slaves of which the husband died possessed, for life, and one half of the personal estate absolutely, where there are no children. *Tibbs* vs *Tibbs' ex'r*. 112.
2. —But in cases where the husband dies intestate as to his goods and chattels or any part thereof, without child or children, the widow, by the 28th section of the same statute, is entitled to one half the slaves and personal estate, after personal debts and just expenses are paid; but she shall have no more than the use for life of such slaves as shall be in her share. *Ibid*, 113.
3. A gift or other disposition by a testator, of property previously devised, is *protanto* a revocation of the will. *Floyd* vs *Floyd*, *&c.* 291.

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WILLS—*Continued.*

4. That a testator was irrational upon some subjects, is not conclusive of his incapacity to make a will, if as to the disposition of his property he manifests rationality. *James et al.* vs *Langdon*, 198.
5. To prove and set up a will not in existance, it is incumbent upon the propounders thereof to prove. 1st. That a valid will was made. 2d. The contents or substance of that will, or of such portion as may be recorded. 3d. That the will, though not in existance at the death of the testator, had not been revoked. *Chisholm's heirs* vs *Ben et al.* 408.
6. By the letter of the statute, the signature is an essential requisite of a will of land or slaves, and it must be complete by signature when attested. (*Swift* vs *Riley*, 1 *B. Monroe*, 116.) *Ibid*, 409.
7. The declarations of a decedent tending to show that he had a will, (to repel the presumption of revocation,) though rejected by the New York Courts, are admitted in Kentucky, though received with caution, and as corroborative only, being in general the lowest species of evidence, and insufficient of themselves to establish a will, where there is not satisfactory evidence of a fraudulent suppression. *Ibid*, 415.
8. The contents of a lost will have never been established in cases where there was not a fraudulent suppression or destruction of the will, unless upon the testimony of a witness who had read the will, and in that way had knowledge of its contents, (see the authorities cited.) Can such proof be admitted where there has not been a fraudulent suppression, to establish the contents of the will?—QUERIE.—REP.
9. Wills should be so construed as to carry out the intention of the testator so far as is consistent with the rules of law. If all its provisions cannot be sustained, it should be carried out so far as is consistent with law. A devise to be applied to the dissemination of the Gospel, at home and abroad, is valid, and the trustees should decide in the first instance, the mode of its appropriation. *Attorney General* vs *Wallace's devisees*, 617.
10. The language used by the testator furnishes an appropriate and peculiar means of ascertaining his intention, but the terms used are to be understood according to the interpretation which such terms have received in judicial determinations on wills, unless the intention of the testator would be thereby violated. *Danforth* vs *Talbot's adm'r.* 625.
11. Instructions given on the trial of an issue as to the competency or incompetency of the testator to make a will, should not restrict the jury to inquiries involving memory alone, and not reason and a knowledge of the natural obligation of relatives. *Howard, &c.* vs *Coke, &c.* 657.
12. In such cases, it is not proper to group a set of facts together and say that their existence or non-existence is conclusive of capacity or incapacity. The jury should be left to weigh all the facts proved which bear upon the question of capacity. *Ibid*, 658.
13. To qualify one to make a will, it is not indispensable that such an one should have sufficient capacity to traffic with and manage property advantageously. *Ibid*, 658.
14. A husband devises his estate, after the payment of his debts, "wholly to his wife, and to be disposed of by her, and divided among my children at her discretion:" Held that the wife took the estate for life, with full power to give to the children, or appropriate it to her own use. She dying intestate, the children take that which is undisposed of under the will. *Collins, &c.* vs *Carlisle, &c.* 14.

See *Devises*, 4, 5.

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WITNESSES.

1. The Marshals of the City of Lexington, whose fees depend upon the conviction of the accused, are incompetent witnesses against persons charged with violations of the ordinance against retailing. The interest though small, is direct. *Bridgeford* vs *City of Lexington*, 48.
2. Where an administrator has been removed, and is not shown to have been guilty of a *devastavit*, he is a competent witness for the administrator *de bonis non*. *Anderson's adm'r.* vs *Irvine*, 209.
3. The fact that an administrator consented to the distribution of the slaves of his intestate, when there was a sufficiency of personal property to pay the plaintiff's demands, does not prove a *devastavit*. *Ibid*, 209.
4. The principal in a delivery bond, is not a competent witness to sustain the plea of *non est factum* by the surety. He is liable over to the surety for debt and costs: (5 *Monroe*, 268; 7 *Cranch*, 206.) *Kelly* vs *Lank & Stephens*, 226.
5. A Sheriff who takes a delivery bond is a competent witness for the plaintiff in a suit on such bond. *Ibid*, 226.
6. The general rule is, that a party to the record is not a competent witness in a trial at law. There are exceptions—the objection may be waived by the party for whose benefit it would operate, but the right to waive belongs to the parties collectively, or those interested in the protection, and cannot be exercised by one for all of a collective party. There are cases in which the plaintiff may enter a *nolle prosequi* against one defendant and make him competent against others, or where one defendant being acquitted may testify for others. In these cases he is disengaged from the records. *Campbell & Co.* vs *Todd & Co.* 316.
7. A guardian is a competent witness to prove the capacity of one who had been his ward, to make a will. *Howard et al.* vs *Coke et al.* 660.

WORDS.

See *Slander*, 1, 2.

Ex. J. C.

ERRATA.

PAGE 487, 16th line from top, for 1845 read 1835.
493, 11th line from bottom, for *of* read *and*.
496, 7th line from the top, for *principal* read *principle*.
500, 11th line from the top, for *or* read *as*.
514, 5th line from the bottom, use *and* after *fund*.
522, 3d line from the top, for *this* read *the*.

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